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No. 90-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March 1, 1991

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QUESTIONS PRESENTED

1. To facilitate maintenance of a nationwide Rule 23(b)(3) diversity class action against more than fifty defendants, may a district court evade established limitations on its subject matter jurisdiction

> (a) by deferring elimination of class members whose claims are not even alleged to satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a);
>
> (b) by relying on a supposed Rule 23(b)(3) exception to the complete diversity of citizenship requirement of 28 U.S.C. § 1332(a) in order to entertain claims of non-diverse class members;
>
> (c) by declaring the common law "local action" restriction inapplicable to tort claims for damage to real property located outside the forum state;

and then, in disregard of those jurisdictional limitations, enter final judgment dismissing with prejudice the claims of all class members against a settling defendant?

2. Where a judgment approving a partial class settlement imposes obligations on class members as compensation for non-settling defendants' loss of state law contribution rights, do non-settling defendants have standing to raise defects in the Rule 23(e) settlement approval procedures that could render those compensatory undertakings unenforceable against class members?

LIST OF INTERESTED PARTIES

The following parties appeared before the United States Court of Appeals for the Third Circuit in this proceeding: Lac d'Amiante du Quebec, Ltee; School District of Lancaster (Pennsylvania); Manheim Township School District (Pennsylvania); Lampeter-Strasburg School District (Pennsylvania); Barnwell School District No. 45 (South Carolina); Board of Education of the Memphis City Schools (Tennessee); and the national class of entities who own or operate, in whole or in part, public and non-profit private elementary and secondary schools. Kaiser Cement Corporation has never been provided a list of all of the class member parties.

The ultimate parent company of Kaiser Cement Corporation is Hanson PLC. The only non-wholly owned subsidiary or affiliate of petitioner Kaiser Cement Corporation is Underwriters Service, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Kaiser Cement Corporation ("Kaiser Cement") respectfully prays that a writ of certiorari issue to review the judgment and majority opinion of a panel of the United States Court of Appeals for the Third Circuit, which affirmed a partial final judgment of the United States District Court for the Eastern District of Pennsylvania dismissing with prejudice the asbestos-in-school buildings claims of all members of a national, diversity-based Rule 23(b)(3) class against settling defendant Lake Asbestos of Quebec, Ltd., now known as Lac d'Amiante du Quebec Ltee ("LAQ").

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Third Circuit, reproduced as Appendix A at 1a-20a, are reported at 921 F.2d 1330. The opinion of the United States District Court for the Eastern District of Pennsylvania, dated February 16, 1990,

is reproduced as Appendix B at 21a-26a and is not reported. The judgments of the Court of Appeals and of the District Court are reproduced as Appendix C and Appendix D, respectively, at 27a-29a and 30a-33a. On subject matter jurisdiction issues, the majority and dissenting opinions of the Court of Appeals referenced opinions entered simultaneously in separate proceedings on petitions for writs of mandamus, reproduced as Appendix E at 34a-76a and reported at 921 F.2d 1310. The unreported opinion of the United States District Court for the Eastern District of Pennsylvania, dated November 14, 1989, which was the subject of the mandamus proceedings, is reproduced as Appendix F at 77a-82a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1990. Kaiser Cement's timely petition for rehearing and suggestion for rehearing *en banc* was denied by an order dated January 9, 1991, reproduced as Appendix G at 83a-86a. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At the time plaintiffs filed the underlying lawsuits, the applicable diversity jurisdiction statute, 28 U.S.C. § 1332(a) (1982), read in pertinent part as follows:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States; . . . .

STATEMENT OF THE CASE

1. This Petition Arises From The Massive "Asbestos School Litigation."

Plaintiff public school districts in the three consolidated complaints below have invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(a) to adjudicate state-law tort and warranty claims, which are based on the contention that the presence of a host of different "friable" asbestos-containing construction materials, such as fireproofing or boiler insulation, installed in school buildings over a period of more than seventy years has caused damage to those buildings.[1] The district court subsequently designated all of the plaintiffs named in the three complaints as representatives of a nationwide Rule 23(b)(3) class defined to include all entities that "own or operate in whole or in part" any public or non-profit private elementary or secondary school.[2] The more than fifty defendants against whom this class was certified to proceed are some of the companies that manufactured or installed asbestos-containing construction products or that mined and supplied the asbestos used in such products.

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[1] The first complaint ("Lancaster Complaint") was filed in the United States District Court for the Eastern District of Pennsylvania on January 17, 1983 by three Pennsylvania school districts who contended that all defendants were jointly liable because of an alleged conspiracy or concert of action. Two virtually identical complaints were subsequently filed in the Eastern District of Pennsylvania by non-Pennsylvania school districts—one located in South Carolina ("Barnwell Complaint") and another in Tennessee ("Memphis Complaint").

[2] The notice of the class action litigation is reproduced as Appendix H at 87a-93a and sets forth the district court's definition of the class. The notice also identifies the class representatives as the named plaintiffs in the three consolidated lawsuits and lists the defendants from all three complaints.

After the Court of Appeals affirmed the LAQ final judgment, the district court on December 17, 1990, redefined the class to include only those entities whose schools contain "friable" asbestos-containing materials. The district court concluded that notice of this redefinition need not be sent to the class.

Together they are either incorporated or have their principal places of business in a substantial number of states.

2. Following Extensive Proceedings, The District Court Ruled That No Subject Matter Jurisdiction Deficiencies Prevented It From Reaching The Merits.

After notice of the class action certification had been mailed to over 36,000 public school districts and private schools appearing on a commercially generated list and more than 1,500 class opt-outs had been identified, a number of defendants challenged the district court's subject matter jurisdiction to adjudicate the class action. These challenges raised three jurisdictional issues:

i. Plaintiffs' complaints did not allege that each member of the Rule 23(b)(3) class had a claim in excess of $10,000 as required by 28 U.S.C. § 1332(a) and by *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In addition, the factual record demonstrated that at least sixty percent of the class members appeared to have jurisdictionally insufficient claims.

ii. Plaintiffs' complaints disclosed that the citizenship of each named plaintiff and each plaintiff class member was not diverse from that of each defendant as required by 28 U.S.C. § 1332(a) and by an unbroken line of Supreme Court decisions dating from *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

iii. The "local action doctrine," applied in decisions such as *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895), precluded exercise of jurisdiction over claims for alleged damage to real property located outside of Pennsylvania.

The district court's initial consideration of these jurisdictional challenges focused on the amount in controversy issue and led to an order directing plaintiffs to file amended complaints "to correct the existing pleading deficiencies." In response, plaintiffs then filed amended complaints alleging that "all members of the class (except a minimal

portion thereof), have claims in excess of $10,000 . . . ." App. 56a n.2.

In light of the admission in the amended complaints that some members of the Rule 23(b)(3) class—the purported "minimal portion"—could not satisfy the amount in controversy requirement, defendants renewed their jurisdictional motions and their showing that sixty percent of the class had insufficient claims. Additionally, defendants emphasized that this Court's recent decision in *Finley v. United States*, 490 U.S. 545 (1989), confirmed what had been apparent in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978), and in *Zahn v. International Paper Co.*—no theory of ancillary or pendent party jurisdiction could empower the district court to exercise diversity jurisdiction where, as here, complete diversity of citizenship did not exist between the class member plaintiffs and the defendants.

On November 14, 1989, the district court rejected each of defendants' jurisdictional challenges. Without articulating any statutory or theoretical underpinning for its decision, the court held that Rule 23(b)(3) class actions were not subject to the requirement of complete diversity of citizenship. App. 81a. The district court also held that the local action doctrine did not apply to claims for monetary damages sounding largely in tort that are "not bound to any issues of title or possession of real property." App. 82a.

As to the amount in controversy requirement, the district court ignored the amended complaints' affirmative allegation that some members of the Rule 23(b)(3) class did not have claims in excess of $10,000, but acknowledged that defendants had made a showing that sixty percent of the class had claims for less than the statutory minimum and that the identity of such class members was unknown. App. 80a-81a. Rather than requiring plaintiffs to identify and dismiss those class members with jurisdictionally insufficient claims before proceeding to the merits, however, the court determined that Fed. R. Civ. P. 12(d) au-

thorized deferral of a jurisdictional determination and concluded that the defects

> can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000. App. 79a.

The district court was then requested to certify its jurisdictional rulings for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b). When those requests were denied, several defendants filed petitions for an extraordinary writ in the Third Circuit Court of Appeals seeking to restrain the district court from acting further before properly establishing its subject matter jurisdiction. These petitions were denied on December 13, 1990. App. 38a-39a.

3. Over Objection, The District Court Entered Final Judgment Dismissing With Prejudice All Claims Against Settling Defendant LAQ.

In the midst of the subject matter jurisdiction controversy, the class reached a $1 million settlement with LAQ, one of the defendants herein, that had mined and sold asbestos fibers that were incorporated into some of the asbestos-containing products at issue. As required by Rule 23(e), the district court scheduled a hearing to consider objections to the settlement and authorized plaintiffs to mail class members an abbreviated description of the settlement agreement that supposedly would enable them to participate meaningfully in the scheduled hearing.[3]

Prior to the Rule 23(e) hearing, Kaiser Cement filed an objection to the district court reaching a merits resolution of the claims against LAQ before plaintiffs had corrected subject matter jurisdiction defects and pointed out that entry of final judgment against all class members was

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[3] The settlement notice is reproduced as Appendix I at 94a-103a. Among other omissions, this notice did not advise class members of plaintiffs' intention to secure an immediate partial final judgment of dismissal.

inconsistent with the court's November 14, 1989 ruling that only class members who proved damages in excess of $10,000 at trial would be subject to final judgment. Kaiser Cement also objected that the procedures adopted to notify the class of the proposed settlement were seriously flawed and that those flaws jeopardized the settlement's binding effect on absent class members, which in turn adversely affected non-settling defendants' contribution rights under the applicable laws of many states.

The district court's February 16, 1990 opinion dealing with the LAQ settlement found that class members "agree to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ," concluded that non-settling defendants' contribution rights were not prejudiced and, on that basis, held that Kaiser Cement lacked standing to object. App. 21a & 26a. The court then approved the $1 million LAQ settlement as adequate for the class and, without even addressing the subject matter jurisdiction deficiencies, entered a final judgment pursuant to Fed. R. Civ. P. 54(b) that dismissed with prejudice the claims of all members of the class against LAQ. App. 31a-33a. Kaiser Cement timely appealed that final judgment to the Third Circuit Court of Appeals.

4. A Sharply Divided Third Circuit Panel Affirmed The Final Judgment.

A. The Majority Found That Jurisdiction In The District Court Was "Proper," While The Dissent Concluded That The Case Must Be Dismissed.

On December 13, 1990, a Third Circuit panel majority denied Kaiser Cement's appeal and affirmed the district court's final judgment dismissing all class members' claims against LAQ with prejudice. App. 29a. On the same day, the same majority rejected the petitions of other defendants for a writ of mandamus directed at the district court's November 14, 1989 subject matter jurisdiction ruling. App. 38a-39a. Relying on its mandamus decision, the

majority did not require plaintiffs to establish the district court's jurisdiction to enter final judgment as to LAQ.

> We determined in *In Re School Asbestos Litig.*, ___ F.2d ___ (3d Cir. 1990) (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (filed on this date) that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, jurisdiction in the trial court was proper based on 28 U.S.C. § 1332. App. 5a-6a.

However, in the referenced mandamus opinion, the majority had not actually determined that subject matter jurisdiction was proper in the district court, at least as to the amount in controversy requirement of 28 U.S.C. § 1332(a). Rather, it simply held that there was no clear obligation to be enforced by mandamus because "the district court had the discretionary authority to delay until trial" resolution of amount in controversy defects appearing on the face of the complaints. App. 47a-48a.

The majority's mandamus decision did reach and reject defendants' contention that the local action doctrine limited the trial court's jurisdiction and essentially adopted the district court's conclusion that the doctrine did not apply to tort causes of action for damage to real property where questions of title or possession were not involved. App. 52a & 53a-54a.

Finally, in addressing the lack of complete diversity of citizenship, the majority's mandamus opinion contended that "Congress's support of diversity-based class actions" was manifested by the legislature's 1988 decision not to do away with virtually all diversity jurisdiction and by the absence of any legislative attempt in 1988 to eliminate diversity class actions. App. 51a-52a. Based on that "support" and in an apparent effort to preserve the availability of such class actions on a nationwide scale, the majority concluded that Rule 23(b)(3) classes were the beneficiaries of a special jurisdictional rule: "only the citizenship of the named class representatives must be diverse from that of

the defendants." App. 48a. The majority's mandamus opinion did not identify any authority for this special jurisdictional rule, beyond citing to dicta in *Snyder v. Harris*, 394 U.S. 332, 340 (1969), and to the decision in *In Re Agent Orange Product Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

In the Court of Appeals mandamus proceedings, Circuit Judge Cowen dissented from the majority's rulings on the amount in controversy and complete diversity of citizenship issues. App. 54a-76a. First, Judge Cowen focused on the directive in *Zahn v. International Paper Co.* that "every plaintiff in a Rule 23(b)(3) class action must independently satisfy the amount in controversy requirement of section 1332(a)." App. 55a. He stressed that "defendants have introduced uncontradicted evidence that when this case was filed as much as 60% of the plaintiff class did not have" claims in excess of $10,000 and that "plaintiffs have admitted in their amended complaints that some plaintiffs cannot in good faith allege claims in excess of $10,000." App. 56a-57a. In the face of plaintiffs' admission, he found unprecedented the decision to postpone correction of this known pleading infirmity until the damage phase of trial, particularly when the district court would continue to make merits rulings affecting all class members in the interim. App. 67a.

Second, on the complete diversity of citizenship issue, the dissent could find no statutory support for the majority's special Rule 23(b)(3) class action exception and therefore concluded that, if such an exception was based on anything, it must be some theory of pendent party jurisdiction. App. 69a n.9. Judge Cowen acknowledged that the earlier decision of the Second Circuit Court of Appeals in the *Agent Orange* litigation supported plaintiffs' theory of a special jurisdictional rule, but found that "its vitality has been totally undermined" by *Finley v. United States*, 490 U.S. 545 (1989). App. 74a-75a. Accordingly, Judge Cowen concluded that Rule 23(b)(3) class actions, like other lawsuits, must satisfy the requirement of complete diversity of citizenship.

> In light of Supreme Court precedent that has consistently refused to read 28 U.S.C.A. § 1332(a) as containing an authorization for federal courts to exercise pendent-party jurisdiction over parties where complete diversity is lacking, I conclude that the district court must dismiss these cases for lack of subject matter jurisdiction. App. 75a.

The above-quoted observations of Circuit Judge Cowen were authored in his dissent in the mandamus proceedings where several defendants sought to restrain the district court from proceeding further on the merits until plaintiffs had cured the jurisdictional defects. In the LAQ appeal, Judge Cowen was confronted with the ultimate merits decision—dismissal of class members' claims against LAQ with prejudice. He thus adopted his mandamus dissent together with the following additional reminder:

> [P]recedent requires that we resolve jurisdictional questions before we dispose of a case on the merits. Here the district court must dismiss those plaintiffs with jurisdictionally insufficient or inappropriate claims before it can enter final judgment against any defendant. App. 20a.

B. The Majority Affirmed The District Court's Ruling That Non-Settling Defendants Lacked Standing To Raise Defects In The Settlement Approval Process, While The Dissent Found That The Failure To Confront Such Defects Was "Patently Unfair."

Kaiser Cement's appeal also raised several defects in the notice procedures leading up to the district court's approval of the class settlement with LAQ. As summarized in the dissenting opinion, they included: (i) the settlement notice had not apprised class members of the district court's ruling that only those who proved jurisdictionally sufficient claims would be subject to the court's jurisdiction; (ii) the notice had failed to inform class members of the significance of the agreement to reduce future judgments against non-settling defendants in that this obli-

gation was not limited to the $1 million paid by LAQ in settlement; and (iii) notice of the settlement had not been mailed to all class members. App. 18a-19a.

The dissent also recognized that, in many jurisdictions, LAQ's settlement "extinguishes contribution and indemnity rights of joint tort feasors" by operation of law. App. 14a. Because of the effect of such state laws and the defects in the settlement approval process, Judge Cowen foresaw that "the non-settling defendants could find that they have received an unenforceable right to a diminution of a judgment in favor of the plaintiff class in exchange for their lost rights to indemnity and contribution from the settling defendant." App. 19a.

Notwithstanding Judge Cowen's demonstration that mere approval of the settlement deprived non-settling defendants of contribution rights as a matter of law in many states, the majority simply recited that the district court's order itself "contains no ruling purporting to limit any claims non-settling defendants may have" (App. 10a) and seemed to agree with the district court that non-settling defendants' rights were sufficiently safeguarded by the undertaking that class members would reduce future judgments against such defendants. App. 8a-10a. Accordingly, the Court of Appeals declined to "reach the issue of whether adequate procedures were followed in the settlement approval process," finding that non-settling defendants lacked standing to raise the issue. App. 10a.

REASONS FOR GRANTING THE WRIT

The partial final judgment affirmed below presents two important issues that potentially will arise whenever there are attempts to adjudicate massive numbers of state law claims against dozens of defendants in a single federal diversity proceeding by means of Rule 23(b)(3) class procedures: first, whether such class actions are subject to the same established limitations on district court jurisdiction as other lawsuits; and second, whether in such actions, potentially injured defendants will be permitted to assure

the binding effect of any final judgment by objecting to the failures of class representatives to follow procedures which are designed to protect absent class members.

The fundamental principle that federal district courts are empowered to exercise jurisdiction only to the extent authorized by the Constitution and by Congress has previously been viewed as an obstacle to the routine use of broad, diversity-based Rule 23(b)(3) class actions in the absence of the enactment of additional authorizing legislation. In fact, non-legislative efforts to overcome such jurisdictional obstacles were twice rejected shortly after the Federal Rules were amended in 1966 to create the modern Rule 23(b)(3) class action. *See Snyder v. Harris*, 394 U.S. 332 (1969) (rejecting aggregation of class members' claims to meet amount in controversy requirement) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973) (rejecting contention that only named class representatives must have claims meeting amount in controversy requirement). In those cases, plaintiffs sought an expansion of diversity jurisdiction by judicial interpretation in order to take advantage of claimed class action efficiencies. Rather than accepting the invitation to expand federal court adjudication of state-law claims, the Court in *Snyder* quoted *Healy v. Ratta*, 292 U.S. 263, 270 (1934), as a reminder of the pivotal federalism role played by the diversity statute's limited grant of jurisdiction.

> Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

Snyder v. Harris, 394 U.S. at 340. Consistent with *Healy's* instruction, both *Snyder* and *Zahn* confirmed that Rule 23(b)(3), which permits adjudication of separate and distinct damage claims of numerous plaintiffs in a representative action, was to receive no different treatment than other procedural joinder devices in terms of the diversity statute's amount in controversy limitation.

Following the 1973 ruling in *Zahn*, large diversity-based Rule 23(b)(3) class actions were almost non-existent, in part due to the Note of the Advisory Committee accompanying Rule 23 that discouraged their use in "mass accident" cases arising under state law. More recently, concern has been voiced that conventional adjudication of large numbers of superficially similar tort actions is unduly burdening the judiciary. This concern has led some to advocate a departure from the direction laid down by the Advisory Committee in the hope that Rule 23(b)(3) class actions would alleviate the case loads of individual courts. *See* 3 *Newberg On Class Actions* § 17.06 at 373 (2d ed. 1985) (quoting Professor Charles Alan Wright). Indeed, plaintiffs in the case below have professed to discern a federal court trend toward the use of Rule 23(b)(3) to address so-called mass torts.

Whether or not such a trend actually exists, in addition to the instant "*Schools*" case, a similar nationwide, diversity-based class action complaint is pending on behalf of all colleges and universities for asbestos-in-buildings claims.[4] In late 1990, another class action, also modeled on the asbestos *Schools* case, was filed in the United States District Court for the Eastern District of Pennsylvania to pursue state law claims arising from the presence of lead-based paint in municipal buildings throughout the country.[5] Also, a national diversity-based class action has been proposed as a means of dealing with all of the existing and expected asbestos personal injury claims.[6] And, in a related

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[4] *See Central Wesleyan College v. W.R. Grace & Co.*, C.A. No. 2:87-1860-8 (D.S.C. July 17, 1987). Ironically, Rule 23(b)(3) class action procedures have been proposed in the *Colleges* and the *Schools* cases to promote judicial savings, even though only approximately 250 asbestos-in-buildings cases of all types have ever been filed in federal or state courts.

[5] *See City of Philadelphia v. Lead Industries Ass'n, Inc.*, Civ. No. 90-7064 (E.D. Pa. Nov. 5, 1990). *See also* Legal Times, Jan. 14, 1991, at 1.

[6] *Linscomb v. Pittsburg Corning Corp.*, Civ. No. 1:86-MC-456 (E.D. Tex. July 19, 1990). *See also In re Allied-Signal, Inc.*, 915 F.2d 190 (6th Cir. 1990).

development, the Judicial Panel On Multidistrict Litigation has recently issued an order to show cause why all asbestos personal injury actions pending in federal courts should not be transferred to a single district under 28 U.S.C. § 1407 in order to provide, *inter alia*, "a mechanism for the transferee judges to fully explore the uniform use of dispositive techniques" such as "classes and subclasses under Fed. R. Civ. P. Rule 23."[7]

While to date these other class action initiatives have produced no decisions dealing with subject matter jurisdiction obstacles, the courts below have ruled that the *Schools* litigation may proceed to the merits, even though plaintiffs' complaints disclosed on their face that traditional district court adjudication would be foreclosed by three fundamental limitations on federal jurisdiction—the amount in controversy and complete diversity of citizenship requirements of 28 U.S.C. § 1332(a) and the local action doctrine's traditional restriction against hearing claims for injury to real property located outside the forum state.

When Kaiser Cement raised these jurisdictional defects in its appeal from the LAQ final judgment, the majority opinion of the Court of Appeals swept them under the rug by ignoring prophylactic rules that have been developed over decades to ensure that federal courts operate within their limited authority. Most importantly, the majority failed to discharge the "special obligation" imposed on every federal appellate court to satisfy itself that the district court actually had subject matter jurisdiction. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Instead, the Court of Appeals adopted the expedient of shifting to defendants the burden of showing a "clear and indisputable lack of subject matter jurisdiction" in the district court. *Compare McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (plaintiff "must carry throughout the litigation the burden of showing that he is properly in court"). In the end, the Court

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[7] *See In re Asbestos Products Liability Litigation (No. VI)*, MDL-875, slip op. at 2 (J.P.M.L., Jan. 17, 1991) (unpublished order).

of Appeals affirmed the final judgment dismissing the claims of all class members against LAQ with prejudice, including the claims of class members as to whom the district court admittedly lacked jurisdiction. *Compare General Investment Co. v. Lake Shore & Michigan Southern Ry. Co.*, 260 U.S. 261, 288 (1922) ("the dismissal, being for want of jurisdiction, should have been without prejudice").

The above-described rulings, if generally accepted, would remove virtually all jurisdictional obstacles to litigating almost any multi-party state law tort claim in federal court through the Rule 23(b)(3) device. Before district courts begin routinely to embark on lengthy class action proceedings in reliance on those rulings, this Court should grant review to clarify and reaffirm that Congress has neither exempted Rule 23(b)(3) class actions from the requirements of 28 U.S.C. § 1332(a) nor authorized other preferential jurisdictional treatment. Guidance on these issues would not only mitigate the waste of resources from continuing to litigate the merits of the present case in federal court, but it would also restrain district courts from succumbing to the temptation to exceed their power in other proposed diversity-based class actions by reconfirming that "[t]he courts, no less than the political branches of the government, must respect the limits of their authority." *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

Review in this case would also provide guidance to the Congress as the ultimate arbiter of the extent to which federal courts should be statutorily empowered to hear state law claims. In its decision below, a majority of the Court of Appeals purported to find Congressional support for diversity-based class actions, but the fact of the matter is that Congress has never acted to confer unique jurisdictional status on Rule 23(b)(3) proceedings. Indeed, when the Judicial Improvements Act of 1990 recently expanded the jurisdiction of federal courts in some circumstances by

authorizing the exercise of "supplemental jurisdiction,"[8] Congress took pains to make clear that "supplemental jurisdiction" was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990) (footnote omitted).[9]

Not coincidently, this Court had previously observed:

> Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress. What is of paramount importance is that Congress be able to legislate against a background of clear interpretative rules, so that it may know the effect of the language it adopts.

Finley v. United States, 490 U.S. 545, 556 (1989).

Providing such guidance to Congress with regard to diversity-based Rule 23(b)(3) class actions would be particularly timely now. In recent years, Congress has been subject to something like a "judicial reform" tug of war. On the one hand, legislation has been proposed to cut back or eliminate diversity jurisdiction in order to alleviate the work load of federal district courts. On the other hand, new legislation has also been sought to combat the "litigation crisis" by expanding the role of district courts in dealing with the proliferation of lawsuits arising from "mass torts." In the case of this latter school of thought at least, national class actions invoking diversity jurisdiction are frequently portrayed as an attractive tool. Kaiser Cement disagrees with that portrayal because of the dif-

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[8] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). The provision of that statute authorizing "supplemental jurisdiction" is applicable to cases filed after the date of enactment of the statute. *Id.* § 310 (adding a new Section 1367 to Title 28).

[9] The footnote omitted from the quotation in the text above reads as follows: "*See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)."

ficulty of identifying and applying the governing law of so many jurisdictions and because of the prospect that both plaintiffs' burdens and defendants' rights will be overlooked in the course of such massive class litigation. Regardless of the merits of that debate, Congress should be afforded a clear picture of the current jurisdictional limitations on diversity-based Rule 23(b)(3) class actions to focus future consideration of competing legislative demands for "judicial reform." The instant case presents an opportunity to provide such guidance.

Kaiser Cement's Petition presents a second important issue which merits review by this Court, particularly if multi-defendant class actions that pursue claims arising under the laws of a multitude of states are to continue. This issue arises from the obvious practical reality that some defendants in such actions will settle and from the less obvious consideration that little guidance exists as to when non-settling defendants will be permitted to object to such partial settlements in order to protect their rights. In the case of the present settlement, Kaiser Cement's concern was created by the fact that, following direct appeal, non-settling defendants would be unable to attack the final judgment approving the LAQ settlement, and that, as a matter of law in a number of jurisdictions, the district court's approval extinguished non-settling defendants' contribution rights against LAQ. Reflecting that concern, Kaiser Cement's appellate objections were directed at defects in the notice procedures followed in approving the settlement and were raised in an attempt to determine if the settlement and, in particular, class members' undertakings to reduce future judgments against non-settling defendants would be enforceable in later litigation.

By refusing to pass on Kaiser Cement's objections, the Court of Appeals appears to have adopted a highly restrictive rule that so long as a settlement agreement imposes a facial obligation on class members to reduce future judgments to account for the responsibility of the settling defendant, non-settling defendants have no stand-

ing to object to defects in the process by which that settlement was approved. The result of such a standing rule would be to deprive the trial court of input from those most likely to identify correctable defects in the approval process, particularly where, as here, the complained of defects deprive class members of the information required to enable them to object at the time of the Rule 23(e) settlement hearing. However, after the settlement has been approved and the time comes for honoring obligations that adversely affect their interests, class members will have both opportunity and incentive to discover earlier defects and to attack the enforceability of such obligations.

For non-settling defendants in the present case, the Court of Appeals' standing ruling means that they have lost their contribution rights against LAQ and may ultimately receive no judgment reduction from class members or, at best, may be forced to litigate to enforce that obligation in a series of collateral actions. Such a result is fundamentally at odds with the rationale underlying this Court's ruling in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) that a defendant has standing to ensure the *res judicata* effect of any subsequent judgment by raising objections to the trial court's exercise of personal jurisdiction over absent plaintiff class members. *See also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-77 (1974) (ruling on defects in proposed class notice procedure without even questioning defendants' standing to raise such issues). A standing rule comparable to that adopted in *Shutts* is essential in federal class actions to fulfill the promise in Rule 23(b)(3) that such procedures will be both "efficient" and "fair" to all litigants. The Court should issue a writ of certiorari in the present case to achieve that end.

I. REVIEW SHOULD BE GRANTED TO CLARIFY AND REAFFIRM THAT ESTABLISHED JURISDICTIONAL LIMITATIONS APPLY TO DIVERSITY-BASED RULE 23(b)(3) CLASS ACTIONS.

A. The Claim Of Each Member Of A Rule 23(b)(3) Class Must Exceed $10,000.

In *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), this Court affirmed the lower courts' refusal to certify a diversity-based Rule 23(b)(3) class action where the district court found that the claims of some members of the proposed class were less than the jurisdictional minimum and that those class members could not be readily identified. The *Zahn* opinion emphasized that, by permitting the joinder of separate claims of multiple plaintiffs in a single representative action, Rule 23(b)(3) did not alter established limitations on diversity jurisdiction. Each class member's claim is a separate "matter in controversy" and must satisfy the jurisdictional minimum set forth in 28 U.S.C. § 1332(a). *Id.* at 301.

The complaints in the present case explicitly admit that not all members of the class subject to the LAQ judgment have a claim in excess of $10,000. Apart from this admission by plaintiffs, defendants demonstrated in the district court that at least sixty percent of the class members had jurisdictionally insufficient claims. App. 56a-57a & 80a-81a. In the face of this record, the Court of Appeals still permitted the litigation to go forward as to all class members in direct contravention of the directive in *Zahn* that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case." *Id. Compare Newman-Green, Inc. v. Alfonzo-Larrain*, 109 S.Ct. 2218, 2221 (1989) (approving cure of jurisdictional defect where non-diverse party was dismissed as soon as the defect became apparent).

The only justification offered for the court's unprecedented departure from *Zahn* was that, in the contemplated multi-stage trial, a jurisdictional cure could be effectuated

at the damages stage by entering final judgment only as to those class members that proved damages in excess of $10,000. Yet, three months later the district court disregarded this supposed justification when, without proof of damages by any class member, final judgment was entered dismissing the claims of *all* class members against LAQ with prejudice. App. 30a-33a. Given plaintiffs' concession that jurisdiction was lacking as to some class members, the district court's judgment dismissing the claims of such class members *with prejudice* and the Court of Appeals' affirmance are so clearly and indisputably wrong that the judgment should be vacated. *See Armour & Co. v. Fort Morgan S.S. Co.*, 270 U.S. 253, 258 (1926) ("[i]f there was no jurisdiction, the decree should . . . be without prejudice").

B. The Citizenship Of Each Rule 23(b)(3) Class Member Must Be Diverse From That Of Each Defendant.

When two or more plaintiffs join their separate claims against one or more defendants in a single action, this Court has long required that the citizenship of each plaintiff must be diverse from that of each defendant. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978) (complete diversity requirement reflects a "congressional mandate that diversity jurisdiction is not to be available when any plaintiff is a citizen of the same State as any defendant").

The statutory language construed in *Kroger*, 28 U.S.C. § 1332(a), authorizes district court jurisdiction over an action when the "matter in controversy" (i) meets the jurisdictional minimum and (ii) is between citizens of different states. *Zahn* held that the claim of each Rule 23(b)(3) class member is a separate "matter in controversy" and therefore must satisfy the amount in controversy requirement. Since each "matter in controversy" must also be between "citizens of different States," it is inescapable from the language of 28 U.S.C. § 1332(a) that each Rule 23(b)(3) class member must also be of diverse citizenship

from each defendant. *See Moore's Federal Practice 1991 Rules Pamphlet*, Part 1, ¶ 23.18.

It is undisputed in this case that many, if not most, class members are citizens of the same state as one or more of the defendants. Nevertheless, the Court of Appeals majority concluded that the district court could exercise jurisdiction over this action. In reaching that decision, the panel did not rely on the language of the diversity statute and understandably did not claim support from any theory of pendent party jurisdiction whereby class members with diverse citizenship could carry those class members who shared citizenship with some of the defendants. App. 44a. In *Finley v. United States*, 490 U.S. 545, 556 (1989), this Court summarized why pendent party jurisdiction would have been unavailing here:

> All our cases—*Zahn*, *Aldinger* and *Kroger*—have held that a grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different parties.

See also id. at 574 (Stevens, J. dissenting) (acknowledging holding in *Kroger* that the congressionally-imposed requirement of complete diversity of citizenship cannot be "circumvented through the exercise of pendent jurisdiction").[10]

With no support from the language of 28 U.S.C. § 1332(a) or from theories of pendent party jurisdiction, the Court of Appeals essentially held that Rule 23(b)(3) created a special diversity jurisdiction rule where "only the citizenship of the named class representatives must be

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[10] Although the courts below did not reach the issue, it seems highly unlikely that claims of different members of the present class would "derive from a common nucleus of operative fact" so as to satisfy the Article III requirement for pendent party jurisdiction. *See Finley v. United States*, 490 U.S. 545, 548-49 (1989).

diverse from that of the defendants." App. 48a.[11] The majority opinion made no effort to respond to the obvious objection that Rule 82 expressly denies that any Federal Rule of Civil Procedure extends the jurisdiction of federal courts. Instead, the Court of Appeals relied on the decision in *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987) and on dicta in *Snyder v. Harris*, 394 U.S. 332, 334 (1969).

Agent Orange is the only other appellate decision that has ever applied a special diversity jurisdiction rule to a Rule 23(b)(3) class action. Like the Court of Appeals here, the court in *Agent Orange* eschewed any explanation of the basis for such a rule and relied instead upon the same dicta in *Snyder v. Harris*. At bottom then, the only claimed support for a Rule 23(b)(3) exception to the complete diversity requirement is *Snyder*, a decision where the parties' citizenship was never at issue.

The sole question before the Court in *Snyder* was whether named plaintiffs and absent members of a Rule 23(b)(3) class could aggregate their separate damage claims to meet the amount in controversy requirement of the diversity statute. Writing for the Court, Justice Black answered that question in the negative. In pure dicta, his *Snyder* opinion also remarked:

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[11] Even then, the Court of Appeals did not explain how the present class action satisfied this "special" rule when, for example, both named class representative Lancaster School District and defendant Pittsburg Corning Corporation are citizens of Pennsylvania.

This lack of even "minimal" diversity occurred because the three complaints below did not name the same array of defendants. Instead, each complaint carefully listed only those companies that were not citizens of the same state as the particular plaintiffs named in that complaint. Having facially complied with the complete diversity of citizenship requirement in their individual complaints, all of the named plaintiffs then secured the district court's certification of a nationwide Rule 23(b)(3) class to proceed against all of the defendants named in any of the three complaints. As a result, named plaintiffs like Lancaster ended up representing the class against defendants like Pittsburg Corning.

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own States. *See Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

Snyder v. Harris, 394 U.S. at 340. The significance attributed to Justice Black's remark by the Court of Appeals below flies in the face of the admonition, issued almost contemporaneously with the *Snyder* opinion, that "this Court does not decide important questions of law by cursory dicta inserted in unrelated cases." *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). As if to confirm the wisdom of that warning, the only case cited in *Snyder* as support for the described "current doctrine"—*Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)—was a class action that, unlike either *Snyder* or *Zahn*, did not purport to adjudicate the separate and distinct claims of individual class members. Instead, *Ben-Hur* involved a contest for control of the funds of a fraternal benefit association in which all of the class members "had a common but indivisible interest." *Id.* at 361. In that context, the district court's exercise of diversity jurisdiction was upheld even though some members of the plaintiff class were citizens of the same state as the defendant.

This Court has subsequently described *Ben-Hur* as one of the few Supreme Court cases which has allowed the exercise of "ancillary" jurisdiction over non-diverse claimants who have indivisible interests in a common fund, "bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger v. Howard*, 427 U.S. 1, 11 (1976). *See Finley v. United States*, 490 U.S. 545, 551 (1989).

But ancillary jurisdiction as used in *Ben-Hur* cannot justify the special diversity rule adopted below, because, in a Rule 23(b)(3) class action, there is no common fund and no "indivisible interest" that requires non-diverse claimants to be parties to a single, federal action. In fact, Rule 23(b)(3) expressly recognizes the right of each class member to control litigation of its separate claim by mandating that all class members be afforded the opportunity to exclude themselves and their claims from the class action. Reflecting that distinction, this Court has already foreclosed reliance on principles of ancillary jurisdiction in cases that invoke Rule 23(b)(3) to adjudicate "separate and distinct claims of class members." *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) (*Zahn* rejected the argument that, in a Rule 23(b)(3) diversity class action, "jurisdiction existed over those claims that involved $10,000 or less as ancillary to those that involved more").[12]

The bottom line is that no decision of this Court provides any principled basis for the special diversity rule endorsed by the Court of Appeals below, which would permit a plaintiff to join under Rule 23(b)(3) an unlimited number of additional parties—plaintiffs and defendants—as to whom diversity of citizenship is lacking. On the other hand, this

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[12] The recent dissent in *Carden v. Arkoma Associates*, 110 S.Ct. 1015, 1023 (1990) suggested that a group of partners seeking to enforce their indivisible interests in a contractual right of the partnership might take advantage of ancillary jurisdiction, like the *Ben-Hur* class, to cure their lack of complete diversity. Whether or not ancillary jurisdiction is so expansive, the *Arkoma* dissent does not support the argument that ancillary jurisdiction is available where separate and distinct claims of class members are joined under Rule 23(b)(3).

First, the dissent's reference to ancillary jurisdiction explicitly relied on *Kroger* (*id.* at 1023-24), which had interpreted *Zahn* as rejecting the use of ancillary jurisdiction in Rule 23(b)(3) class actions. Second, under the dissent's proposed "real party to the controversy test," individual Rule 23(b)(3) class members undeniably have the ability to initiate and control litigation as to their separate claims and thus must be counted for purposes of the complete diversity of citizenship requirement. *See id.* at 1026.

Court has never expressly held that Rule 23(b)(3) classes are not exempted from the complete diversity requirement imposed by 28 U.S.C. § 1332(a), thereby leaving the door open for the exercise of judicial power by fiat. The Court should grant review in this case and end the ambiguity.

C. The Local Action Doctrine Requires That Claims For Injury To Real Property Be Adjudicated In The State Where The Property Is Located.

The federal local action doctrine traces to *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811), a tort action for injury to real property, where Chief Justice Marshall held that the complaint must be dismissed because the property was located outside of the forum state. This Court subsequently endorsed the local action limitation on district court jurisdiction recognized in *Livingston*. *See Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 (1895); *McKenna v. Fisk*, 42 U.S. (1 How.) 241, 247 (1843).

Although most members of the class in the present case are seeking damages for injury to buildings that are located outside of Pennsylvania, the Court of Appeals concluded that the local action doctrine was inapplicable since "plaintiffs' claims are 'largely tort claims,' which are 'transitory' rather than 'local' in nature" (App. 52a) in that they "are not bound to any issues of title or possession of real property" (App. 53a-54a). In support of that conclusion, the majority opinion cited a single asbestos-in-buildings case in the Eastern District of Texas[13] but did not discuss two conflicting asbestos-in-buildings decisions in the Southern District of Mississippi that applied the local action doctrine and dismissed the complaints on jurisdictional grounds.[14]

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[13] *Dayton Indep. School Dist. v. U.S. Mineral Prods. Co.*, Civ. No. B-87-00507-CA (E.D. Tex. Feb. 14, 1989).

[14] *Trust Company Bank v. United States Gypsum Co.*, Civ. No. S89-0569 (R) (S.D. Miss. Sept. 27, 1990); *Richmond County Hospital Authority v. The Celotex Corp.*, Civ. No. S89-0502 (G) (S.D. Miss. Sept. 14, 1990).

More significantly, the Court of Appeals did not confront the fact that this Court's earlier decisions in *Ellenwood* and *McKenna* simply do not support the "tort claim" versus "title or possession" dichotomy relied on by the Court of Appeals. In *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895), the complaint sought damages for trespass and cutting of timber and did not involve an effort to recover the title or the possession of the land. *Id.* at 107 ("an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the State in which the land lies"). Similarly, *McKenna v. Fisk*, 42 U.S. (1 How.) 240, 247 (1843) held that an action for damage to a small storehouse inflicted by a mob was local.

Both *Ellenwood* and *McKenna* rest on the same common law principles as *Livingston* and, contrary to the opinion of the court below, the "firmly established" distinction between transitory and local actions applied in *Livingston* by Chief Justice Marshall had nothing to do with whether a particular case presents issues of title or possession. Rather, it turned on whether the injury is to a movable subject (personality or the person) and hence "might happen in any place," or to an immovable subject (real property) that is "necessarily local." *Livingston v. Jefferson*, 15 F. Cas. 660, 664 (C.C.D. Va. 1811).[15]

In short, like matters of domestic relations and probate, actions for injuries to out-of-state real property have been excluded from district court jurisdiction since the earliest

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[15] In recognizing this distinction, Chief Justice Marshall followed the "firmly established" rule as it was stated by Blackstone and in an editorial commentary thereon by Chitty. *Id.* The portion of Blackstone cited by Marshall teaches that an action is transitory only if it is "for injuries that might have happened anywhere." 3 Blackstone, *Commentaries on the Laws of England* Ch. XX at 294. Chitty's editorial commentary at note 4 elaborated that "[a]ctions for every kind of injury to real property are local, as for nuisances, waste, etc."

The above quotations are from the version of the Commentaries with notes by Joseph Chitty, published in 1826. Petitioner has been unable to locate the earlier version cited by Chief Justice Marshall.

days of the nation. *See Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 287 (5th Cir. 1987) ("[t]he local action doctrine is so ingrained in our jurisprudence that a claimant does not normally challenge the rule's existence"). That exclusion, as reflected in the *Livingston*, *Ellenwood* and *McKenna* decisions, is flatly inconsistent with maintaining a Rule 23(b)(3) class action in the United States District Court for the Eastern District of Pennsylvania that seeks to recover monetary damages for alleged injuries to buildings located in every state. Reaffirmation by this Court of the local action restriction on district court jurisdiction is needed now not only to redirect the present case but also to prevent the Third Circuit's erroneous interpretation from influencing other massive proposed property damage class actions pending in that Circuit and elsewhere. *See* p. 13 *supra*.

II. REVIEW SHOULD BE GRANTED TO CONFIRM THAT POTENTIALLY INJURED NON-SETTLING DEFENDANTS HAVE STANDING TO RAISE DEFECTS IN RULE 23(e) SETTLEMENT APPROVAL PROCEDURES THAT COULD RENDER THE RESULTING FINAL JUDGMENT UNENFORCEABLE AGAINST CLASS MEMBERS.

There has been no dispute in this case that the claims of each class member must be adjudicated under the substantive laws of the particular jurisdiction in which its buildings are located. Likewise, as to each class member's claim, a defendant's contribution rights vis-a-vis other defendants will be governed by the same state laws. Judge Cowen demonstrated in his dissenting opinion that, under the laws of many of those states, final approval of one defendant's settlement extinguishes the contribution rights of non-settling defendants against that defendant. App. 14a.[16] To compensate for the loss of such rights, the dis-

[16] The existence of state-law contribution rights and the adverse effect of settlement approvals on such rights under state laws make inapplicable class action standing guidelines developed in antitrust litigation, since defendants in such actions have no rights of contribution to lose.

trict court found that class members agreed "to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ." App. 21a.

The problem for non-settling defendants is that this judgment-reduction obligation will protect them only if it is enforceable against class members. In an effort to deal with that problem, Kaiser Cement's appeal raised several defects in the settlement approval process that jeopardized its binding effect. However, the majority below concluded that non-settling defendants lacked standing to raise such issues on appeal and, as a result, did not deal with the enforceability of the district court's order imposing the judgment-reduction obligation.

The Court of Appeals' standing ruling in this regard is unprecedented and conflicts with this Court's holding in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).[17] In *Shutts*, the defendant challenged the state court's authority to exercise personal jurisdiction over the members of a nationwide opt-out class, including those who had no connection with the forum state. Before reaching that issue, this Court unanimously rejected plaintiffs' contention that the defendant had "no standing to assert the rights of its adversary, the plaintiff class" on appeal. *Id.* at 804. *Shutts*

See, e.g., In re Beef Indus. Antitrust Litigation, 607 F.2d 167, 183 (5th Cir. 1979) (relied upon by the majority below at App. 10a).

[17] In support of its ruling, the Court of Appeals cited (App. 9a-10a) the Ninth Circuit's opinion in *Waller v. Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987), where the non-settling defendant did not even argue that its contribution rights were affected. By contrast, when approval of a partial settlement affected non-settling defendants' contribution/claim reduction rights, the Ninth Circuit permitted them to appeal and challenge the approval. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1223 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 232 (1990).

The Court of Appeals also quoted (App. 9a) a conclusory statement inserted into the pocket part supplement of a treatise authored by one of plaintiffs' counsel herein. As the dissent observed, this conclusory statement had been added to the treatise during the pendency of the present case. App. 16a-17a.

reasoned that the only way a defendant in a class action can assure itself of the binding effect of a judgment

> is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Id. at 805. In the present case, Kaiser Cement sought to ascertain whether the notice procedures followed in the district court were adequate, because inadequate notice here, like the possible lack of personal jurisdiction in *Shutts*, could prevent the LAQ settlement and plaintiffs' related obligation to reduce any future judgment from having any res judicata effect on class members. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (class member must be given notice of the proceeding so that it can choose "whether to appear or default, acquiesce or contest"); *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973) (settlement notice procedures defective; all settlement orders vacated).[18]

The majority's refusal to resolve these issues not only departs from *Shutts* but it also cannot be squared with Rule 23(b)(3)'s requirement that the class action device must be superior to other available methods "for the fair and efficient adjudication of the controversy." As Judge Cowen underscored in his dissenting opinion:

> It is patently unfair to place the non-settling defendants in the position in which they now find themselves—having to accept a potentially unen-

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[18] Indeed, as a different panel of the Court of Appeals for the Third Circuit has recognized:

> If the defendant wishes to achieve maximum preclusive effect, it is up to the defendant to ensure that the class is appropriately certified, and the absent members are adequately represented.

In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760, 770 (3d Cir.), *cert. denied*, 110 S.Ct. 77 (1989).

> forceable right to set-off in exchange for the contribution or indemnity remedies they would otherwise have.

App. 20a. And, with the enforceability of the LAQ final judgment left up in the air, the prospects for subsequent lawsuits by disgruntled class members are significantly enhanced, thereby undercutting any claimed efficiencies for the instant class action. To ensure that this and other diversity class actions will indeed be fair and efficient, the Court should grant review to confirm the standing of non-settling defendants to protect their rights to contribution under state laws.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., *et al.*,
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1247 & 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and NORTHEASTERN SCHOOL DISTRICT

Appellees,

vs.

LAKE ASBESTOS OF QUEBEC, LTD.
THE CELOTEX CORPORATION, RAYMARK
INDUSTRIES, INC., UNION CARBIDE CORP.,
ASBESTOSPRAY CORP.,
SPRAYO-FLAKE COMPANY,
NATIONAL GYPSUM CO., SPRAYED INSULATION,
INC., ASBESTOS FIBRES INC.,
DANA CORPORATION,
U.S. GYPSUM, U.S. MINERAL
PRODUCTS COMPANY,
SPRAYON INSULATION & ACOUSTICS, INC.,
SPRAYON RESEARCH CORP., KEENE CORP.,
WORBEN CO., INC.,
WILKIN INSULATION COMPANY,
W.R. GRACE & CO.,
OWENS CORNING FIBERGLAS CORPORATION,
STANDARD INSULATION, INC.,
NORTH AMERICAN ASBESTOS CORPORATION,
CASSIAR RESOURCES LTD.,
BELL ASBESTOS MINES, LTD.,
ASBESTOS CORPORATION LIMITED,
SOUTHERN TEXTILE CORP., OWENS-ILLINOIS,
INC., TURNER & NEWELL LIMITED, THE
FLINTKOTE CO., FIBREBOARD CORPORATION,
GAF CORP., UNIROYAL, INC., CAPE ASBESTOS,
PFIZER, INC., KAISER CEMENT CORPORATION,
BES-TEX, INC., GEORGIA-PACIFIC CORP.

Kaiser Cement Corporation,
Appellant No. 90-1247

United States Gypsum Company,
Appellant No. 90-1248

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 0313 2, 83 00268)

Argued: Wednesday, September 19, 1990

Before: SCIRICA, COWEN and ALDISERT,
Circuit Judges.

(Filed December 13, 1990)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

Here we are confronted with an appeal by two non-settling defendants in a nationwide class action asbestos action who unsuccessfully contested a settlement agreement entered into by another defendant in the district court. We conclude that these non-settling defendants lack standing to challenge the agreement. Accordingly, we affirm the judgment of the district court.

I.

In 1984, the district court certified a nationwide opt-out class of school districts seeking to recover from approximately fifty defendants. Three defendants made offers to settle: Owens-Illinois, Inc., Proko Industries, and Lake Asbestos of Quebec, Ltd. ("LAQ"). The district court approved the OI/Proko settlement, over objections by certain defendants. The court ruled that such non-settling defendants lacked standing to object to a settlement with a co-defendant.

On November 27, 1989, the district court preliminarily approved a one million dollar settlement with LAQ; it also approved a corresponding form of notice submitted by the class plaintiffs, directing notice to be sent by first class mail. The district court concluded that the settlement with LAQ was fair, reasonable, adequate, and proper, and entered final judgment on the settlement as to the class defined in the settlement agreement. Two non-settling defendants, Kaiser Cement and United States Gypsum, appeal the LAQ settlement agreement.

In the underlying litigation a question was raised as to jurisdiction. We determined in *In re School Asbestos Litig.*,

___ F.2d ___ (3d Cir. 1990) (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (filed on this date) that the defendant petitioners had not met their burden of showing a "clear and indisputable lack of subject matter jurisdiction in the district court." Thus, jurisdiction in the trial court was proper based on 28 U.S.C. § 1332. Jurisdiction on appeal is proper based on 28 U.S.C. § 1291. Appeal was timely filed under F.R.A.P. 4(a).

Review of the essentially legal question of standing is plenary. *PIRG of New Jersey v. E.P.A.*, 913 F.2d 64 (3d Cir. 1990).

II.

The district court held that Kaiser and United States Gypsum lacked standing to contest the LAQ agreement:

> As a general rule, a non-settling defendant is not prejudiced by the settlement and therefore has no standing to contest the settlement. *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979). There are, however, two recognized exceptions to this general rule. A non-settling defendant can object to a settlement: 1) when the terms of the settlement preclude the non-settling defendant from seeking indemnification from the settling defendant, and 2) when the settlement affects the rights of the non-settling defendant. *In Re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979); *In Re Fine Paper Litigation*, 632 F.2d 1081 (3d Cir. 1980).

Pretrial Order No. 66; Appellees' Brief at 7. The court recognized the general exception to the rule denying standing when "non-settling defendants are precluded

from seeking indemnification from settling defendants" and rejected appellant Kaiser Cement's claim that its right to indemnification or contribution was compromised. Memorandum and Order of February 16, 1990 at 6; App. at 809.

III.

Kaiser and U.S. Gypsum argue on appeal that their rights are not adequately protected by the settlement agreement and that they have standing to raise issues arising from the LAQ settlement. Basically, their argument is that the settlement agreement bars them from pursuing claims for contribution or indemnity against LAQ. *See* Brief for Kaiser Cement Corp. at 37-43; Brief for U.S. Gypsum at 14-20. They contend that their dismissal by the district court leaves them out in the cold, unable to test subject matter jurisdiction and the adequacy of the procedures leading to final judgment. They argue that they should be given the opportunity to assert these claims in order to preserve their rights to contribution or to establish judgment reduction rights against class members in this or subsequent litigation.

The appellees counter that these protestations are without merit. They argue that appellants have failed to demonstrate legal prejudice that might give them standing to contest the LAQ settlement and, lacking this, their "lost opportunity" argument cannot be asserted and their appeal should be dismissed.

It is clear that the appellants bear the burden of demonstrating that they have standing. *See e.g., Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Baker v. Carr*, 369 U.S. 186, 204 (1961). To establish standing to appeal a settlement, a non-settling defendant may not merely claim an interest in the lawsuit but must show some cognizable prejudice to a legal relationship between it and the settling parties. *In re Fine*

Paper Litig. State of Wash., 632 F.2d 1081, 1087 (3d Cir. 1980) (non-settling party may not object to settlement terms that do not affects its own rights); *Utility Contractor's Ass'n of New Jersey v. Toops*, 507 F.2d 83, 85 (3d Cir. 1975) (non-settling parties have no standing to object to partial settlement where they demonstrated no interference with any legal relationship between them and the settling parties), *see also Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987); *Quad /Graphics, Inc. v. Fass*, 724 F.2d 1230 (7th Cir. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 614 F.2d 111 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981). The appellants assert that standing is established because their rights to contribution or indemnity are compromised by the LAQ settlement. We disagree.

IV.

The agreement with LAQ specifically provides that, in the event any defendant obtains a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against such defendant will be reduced by any "amount percentage or share of such judgment attributable to LAQ":

> The Class shall reduce any judgment it obtains against any defendant by the amount, percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the Claims. In the event that the Class obtains a judgment (including pursuant to a settlement agreement) against one or more of those defendants, obtains a judgment over, in whole or in part,

> against one or more of those defendants in the Litigation and any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity, then the Class will be required to reduce or remit any judgment or portion thereof obtained from those defendants by the amount of the judgment over against LAQ.

Paragraph 12 of Settlement Agreement; App. at 178. In his text on class actions, Herbert B. Newberg, counsel for plaintiff-appellees here, examined this scenario and concluded:

> When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law or, in the absence of statute, by a reduction in the judgment against non-settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, non-settling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement. See § 12.42A.

2 *Newberg on Class Actions* § 11.54 n.472 (2d ed. 1990 Pocket Part at 103). We accept these reasons and find them consistent with our policy of encouraging settlement of complex litigation that otherwise could linger for years. *See also Waller v. Financial Corp.*

of Am., 828 F.2d 579 (9th Cir. 1987); *In re Beef Industry Antitrust Litig.*, 607 F.2d 167 (5th Cir. 1979).

The settlement agreement in this case specifically recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have. Accordingly, appellants lack standing. We, therefore, do not reach the issue of whether adequate procedures were followed in the settlement approval process. *See In re Beef Industry Antitrust Litig.*, 607 F.2d at 172.

V.

The judgment of the district court will be affirmed.

Cowen, *Circuit Judge*, dissenting.

This appeal arises from a final judgment entered pursuant to a partial settlement agreement between one class action defendant and the plaintiff class under Fed. R. Civ. P. 23(c)(3) and Fed. R. Civ. P. 54(b) in three consolidated class actions filed in the United States District Court for the Eastern District of Pennsylvania. The final order dismisses with prejudice the claims of all class members against defendant Lac D'Amiante Du Quebec, Ltee ("LAQ"). It also purports to bind members of the plaintiff class to "adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ" App. at 804.

Kaiser Cement Corporation and United States Gypsum Company (the "non-settling defendants") object to the settlement arguing that it prejudices the rights of non-settling defendants. The district court disagreed and held that their rights are not prejudiced and that the non-settling defendants lack standing to challenge the adequacy and fairness of the settlement. The majority opinion affirms.

Because I believe that the district court lacks jurisdiction over these consolidated Rule 23(b)(3) class action cases and that the settlement prejudices the rights of non-settling defendants, I respectfully dissent.

I.

For the reasons set forth in my dissent in *In re School Asbestos Litig.*, ___ F.2d ___ (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (3d Cir. 1990) (Cowen, J., dissenting) (filed on this date), I believe that the district court lacks subject matter jurisdiction in the underlying litigation. Accordingly, I would remand to the district court to vacate the judgment of the district court and dismiss the case.

Even if the district court did have jurisdiction, it would nevertheless be inappropriate to enter final judgment with respect to LAQ because the district court has not yet determined the identity of the plaintiff class.

A.

Rule 23(c)(3) requires that a final judgment in a Rule 23(b)(3) class action "include and specify or describe" those whom the court finds to be members of the class.[1] The district court has not yet determined which plaintiffs are actually part of this nation-wide class action suit, because all parties acknowledge that some members of the plaintiff class have claims for less than the minimum amount in controversy required by former 28 U.S.C.A. § 1332(a).

Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) requires that "[e]ach plaintiff in a Rule 23(b)(3) class

[1] Rule 23(c)(3) reads in relevant part:

> The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

action . . . satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ." In order to avoid dismissing the entire class action now, as *Zahn* requires, the district court has vowed in Pre-Trial Order No. 197 to "cure" the jurisdictional deficiencies after trial by entering final judgment only on behalf of plaintiffs who have proven claims meeting the jurisdictional minimum. App. at 542-543.

As I discuss in my dissent in *In re School Asbestos Litig.*, ___ F.2d ___ (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (Cowen, J., dissenting) (filed on this date), this approach is flawed. Nevertheless, the majority in that case allows the district court to proceed to the merits without first curing the acknowledged jurisdictional defects. *Id.*, maj. typescript op. at 12-17. Therefore, the subject matter jurisdiction of the district court, if it exists at all, is predicated on Pre-Trial Order No. 197, indicating that the district court will not enter final judgment with respect to any plaintiff who fails to establish a jurisdictionally sufficient claim. App. at 542-543. In other words, the identity of the plaintiff class will not be determined until a damages-stage trial. That is precisely why the district court may not enter a final judgment against LAQ now: the entry of final judgment with respect to a class action defendant before determining the identity of the plaintiff class violates the plain language of Rule 23(c)(3) which requires that the judgment "include and specify or describe" those whom the court finds to be members of the class.

B.

Even if Rule 23(c)(3) did not require that the court identify the members of the plaintiff class before the entry of final judgment, precedent mandates that the district court resolve questions as to its jurisdiction before the entry of final judgment. *See Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 905 F.2d 42, 45 (3d Cir. 1990) ("[A]

federal court is bound to consider its own jurisdiction preliminary to consideration of the merits.") (citations omitted); *Pacific Intermountain Express Co. v. Hawaii Plastics Corp.*, 528 F.2d 911, 912 (3d Cir. 1976) (per curiam) ("a district court is not permitted to dispose of a case against a party on non-jurisdictional grounds until it first determines it has jurisdiction over such party.")

Both *Wausau* and *Hawaii Plastics* involved declaratory judgment actions where the district courts disposed of the cases as an exercise of discretion under the Declaratory Judgment Act before they resolved the pending challenges to the district courts' jurisdiction. In both cases we reversed.

In *Wausau*, we explained that disposition of a case "amounts to the exercise . . . of dominion over [the] matter, clearly presupposing . . . subject matter jurisdiction in the first instance. *Wausau*, 905 F.2d at 45. Likewise, in *Hawaii Plastics* (where both the court's personal and subject matter jurisdiction were challenged), we held that a court may not dismiss a case on non-jurisdictional grounds until it determines that it has jurisdiction. *Hawaii Plastics*, 528 F.2d at 912.

In the case at bar, the district court considered whether it had subject matter jurisdiction and concluded that it did—provisionally. That is, the district court determined that it could exercise jurisdiction over the consolidated case, *as long as* it entered no final judgment in favor of a plaintiff with a jurisdictionally insufficient claim. Entry of final judgment before identifying which plaintiffs must be dismissed undermines the only basis on which the district court can conceivably maintain jurisdiction over this case. To avoid disposing of this case on non-jurisdictional grounds before the district court "cures" the acknowledged jurisdictional defects, I would require that the district court postpone the entry of final judgment against LAQ until it first determines that it has jurisdiction over

every plaintiff who will share in the judgment, as required by *Zahn*, 414 U.S. 291 and Rule 23(c)(3).

II.

The majority opinion declines to reach the question whether the entry of final judgment in this case is proper on the grounds that the non-settling defendants lack standing to challenge the settlement agreement. I disagree with this conclusion. I do, however, agree with the majority's statement of the law in Section III with respect to standing: a non-settling defendant "must show some cognizable prejudice to a legal relationship between it and the settling parties." Maj. typescript op. at 8. I also agree that this test is met (1) when the terms of the settlement preclude the non-settling defendant from seeking contribution or indemnification from the settling defendant, and (2) when the settlement otherwise affects the rights of the non-settling defendant. Maj. typescript op. at 6. I part company with the majority only in its conclusion that the non-settling defendants have failed to meet the "legal prejudice" test in this case.

A.

The parties agree and the majority apparently recognizes that the non-settling defendants *will* be prejudiced by the LAQ settlement. The non-settling defendants will be prejudiced because in many jurisdictions, a defendant's good faith settlement (such as the settlement of LAQ in this case) extinguishes contribution and indemnity rights of joint tortfeasors. *See Board of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 803-804 (W. Va. 1990) (collecting cases); *Lowe v. Norfolk & Western Ry. Co.*, 753 S.W.2d 891 894-95 (Mo. 1988) (en banc). The effect will be that the non-settling defendants will not be entitled under the law of many jurisdictions to obtain a reduced judgment against themselves for the

share or percentage of the judgment attributable to the conduct of LAQ.[2] Indeed, LAQ has conceded that "the settlement may have the effect, under applicable law, of barring non-settling defendants from seeking contribution or indemnity from LAQ for certain Class members' claims." App. at 656.

The settlement agreement with LAQ seeks to vitiate this prejudice by including a provision stating that any judgment for contribution that a non-settling defendant obtains against LAQ will be satisfied by a reduction from that non-settling defendant's liability to the prevailing plaintiff class.[3] In essence, the plaintiff class has agreed

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[2] I Realize that in some states this prejudice will be mitigated by a statutory by the non settling defendant to receive a set-off in the judgment against it. *See* 2 *Newberg on Class Actions* § 12.42A Supp. at 124-25 (2D ed. Supp. 1990) ("Twenty-two states have adopted some form of 'settlement bar statute.' These statutes permit settling defendants to escape cross- and third-party claims for contribution by granting nonsettling joint tortfeasor codefendants some form of offset rights in any future judgment by the settling plaintiff against them."). Even in these states, the non-settling defendants may be prejudiced depending on which method of off-set the state uses: *pro tanto* (a reduction in the verdict by the amount that the settling defendant already paid—which could be less than that defendant's proportionate liability, which in turn would leave the non-settling defendants liable for more than their fair share); or *pro rata* (a reduction in the verdict by that proportion of the judgment that was attributable to the settling defendant). In states that have *pro tanto* settlement bar statutes, the non-settling defendants are prejudiced by the lost opportunity either to get contribution from the settling defendant or to get a *pro rata* set-off from the judgment against them.

[3] The settlement agreement provides,

> The Class shall reduce any judgment it obtains against any defendant by the amount, percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the Claims. In the event that the Class obtains a judgment (including pursuant to a settlement agreement) against one or more defendants in the Litigation and

as part of the settlement with LAQ that it will reduce from any judgment it obtains against a non-settling defendant any liability LAQ has to the non-settling defendant as a result of LAQ being a joint tortfeasor.

The determinative question is whether LAQ and the plaintiffs can defeat the non-settling defendants' standing to challenge a settlement agreement which prejudices their rights merely by including a provision in the settlement agreement that plaintiffs will reduce their judgment against the non-settling defendants by the amount of the contribution judgment against LAQ. I believe that the inclusion of such a provision cannot defeat the non-settling defendants' standing for two reasons: first, there is no precedent for it; and second, there is no guarantee that this right to a set-off will be enforceable against the plaintiff class in the event the settlement agreement were later found to be unfair, inadequate, or entered into pursuant to an inadequate procedure. In short, a non-settling defendant could find itself cut off under state law from its rights of indemnity or contribution against LAQ by the existence of a good faith settlement agreement between LAQ and the plaintiff class, and yet unable to enforce the right to a reduced judgment that it purportedly received in exchange.

B.

The majority has cited only one authority for the proposition that a provision in a settlement agreement can defeat a non-settling defendants' standing. That sole authority is the 1990 pocket part of Herbert B. Newberg's

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any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity, then the Class may be required to reduce or remit any judgment or portion thereof obtained from those defendants by the amount of the judgment over against LAQ.

Paragraph 12 of the Settlement Agreement, App. at 178.

treatise on class actions. 2 *Newberg on Class Actions* § 11.54 n.261 (2d ed. 1990 Supp.).[4] The pocket part cites no court or other authority for its statement.

Mr. Newberg is a paid advocate, not a disinterested scholar. He entered an appearance as co-lead counsel in this case on May 10, 1984. He signed the briefs on this appeal and argued one of the related cases at oral argument. Under the circumstances, the assertion in his treatise, which he added while this case was pending, must be treated like the partisan opinion of a paid advocate. I am at a loss to understand why the majority has found it persuasive and has relied on it as the sole authority for the proposition that a plaintiff can defeat a non-settling defendant's standing by such a provision in the settlement agreement. In the 1985 edition of his treatise, Mr. Newberg recognized no limitation to the general rule that "non-settling defendants . . . may object to any terms [in a settlement] that preclude them from seeking indemnification from the settling defendants." 2 *Newberg on Class Actions* § 11.54 (2d ed. 1985) (footnotes omitted).

C.

The non-settling defendants raise several grounds for asserting that the settlement agreement might not bind

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[4] Mr. Newberg writes:

> When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law, or in the absence of statute, by a reduction in the judgment against non-settling defendants by the amount of any contribution judgment against settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, nonsettling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement. See § 12.42A.

2 *Newberg on Class Actions* § 11.54 n.261 (2d ed. 1990 Supp.).

the plaintiff class. Essentially, the non-settling defendants argue that the settlement notice mailed to the class members was not sufficient to enable a class member to judge the settlement's reasonableness. As a result, the non-settling defendants are concerned that they will not be able to enforce the settlement agreement, but will nevertheless have lost their rights to contribution or indemnity under the laws of some jurisdictions.

The first problem with the notice mailed to class members is that it did not disclose that there was severe doubt regarding the district court's subject matter jurisdiction. There are 35,000 institutions which receive notice regarding the class action. The court does not have jurisdiction over all of them. None of the class members, however, have been informed that their rights are not being litigated in the class action. Quite the contrary, each class member has every reason to believe that not only are its rights being adjudicated, but that it cannot seek to recover damages on its own because the federal class action is the exclusive forum for resolving the asbestos in schools liability issues. In the meantime, some of those class members (perhaps even a majority) will not only fail to share in the settlement, but also lose their ability to pursue relief separately since the applicable statutes of limitation will eventually expire. Accordingly, the class members who received notice of the partial settlement were unable to assess the risks of agreeing to the settlement and were unable to protect themselves by objecting.

The second reason that the settlement notice was insufficient is that it failed to explain the significance of the release that the class gave to LAQ. There is no limitation in the amount that the plaintiff class has agreed to setoff. It is consequently possible that the non-settling defendants will have contribution or indemnity claims against LAQ that exceed the amount LAQ has paid to settle its liability in this case. The plaintiff class members have never been informed of this possibility and so were

unable to assess the risks of not objecting to the settlement with LAQ.

Finally, the settlement notice was inadequate because it was not mailed to all members of the class as required by Rule 23(e) and Procedural Due Process. *See Girsh v. Jepson*, 521 F.2d 153, 158 (3d Cir. 1975). The class is defined as all entities that "own or operate in whole or in part" any public or private elementary and secondary educational facility, as defined in 20 U.S.C.A. § 2854(a)(10) (1982) (current version at 20 U.S.C.A. § 2891(12) (1990)). App. at 153. Notice has only been sent to public and private schools, and not to any non-school private party or state agency. App. at 157. In addition, no notice has ever been sent to any school in Puerto Rico, Guam, American Samoa, the virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, although all these areas fall within the statutory definition invoked in the class definition. *See* 20 U.S.C.A. § 2854(a)(10), (16) (1982) (current version at 20 U.S.C.A. § 2891(12), (22) (1990). *See also* App. at 153. In other words, plaintiffs have failed to notify some parties that are entitled to receive notice of the class action proceeding, since they are ostensibly members of the plaintiff class.

We have previously held that where "notice was fatally defective, all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to those proceedings will therefore be vacated." *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 834 (3d Cir. 1973). In other words, the non-settling defendants could find that they have received an unenforceable right to a diminution of a judgment in favor of the plaintiff class in exchange for their lost rights to indemnity and contribution from the settling defendant.

Even if there is no merit to the claims of the non-settling defendants that the notice was insufficient for the reasons discussed above, I do not think that it comports

with Due Process to allow the plaintiffs and LAQ to shift the risk of the unenforceability of the settlement agreement to the non-settling defendants. It is patently unfair to place the non-settling defendants in the position in which they now find themselves—having to accept a potentially unenforceable right to set-off in exchange for the contribution or indemnity remedies they would otherwise have.

III.

Because I believe that the district court lacks subject matter jurisdiction, I would remand to the district court to vacate the judgment and dismiss the case. Even if the district court did have subject matter jurisdiction, the entry of final judgment in this case is inappropriate: the district court has not yet identified the plaintiffs who comprise the class that was certified in these consolidated actions, in violation of the plain language of Rule 23(c)(3). Even without Rule 23(c)(3), precedent requires that we resolve jurisdictional questions before we dispose of a case on the merits. Here the district court must dismiss those plaintiffs with jurisdictionally insufficient or inappropriate claims before it can enter final judgment against any defendant. In addition, I believe that the non-settling defendants have standing to challenge the settlement agreement since it prejudices their rights in a number of ways. I would vacate the judgment and remand to dismiss the class action consistent with my dissent in *In re School Asbestos Litig.*, ___ F.2d ___ (Nos. 90-1125, 90-1126, 90-1185, 90-1199) (Cowen, J., dissenting).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO ALL ACTIONS

FILED

FEB 20 1990

MICHAEL E. KUNZ, Clerk

MEMORANDUM AND ORDER

J. M. KELLY, J. FEBRUARY 16, 1990

The plaintiffs and Lac D'Amiante du Quebec, Ltee (LAQ), one of 50 defendants remaining in this action, reached an agreement for partial settlement of this matter on March 31, 1989. The terms of the agreement call for LAQ to pay $1,000,000.00 (one million dollars) to the class. In exchange, the class members will dismiss their claims against LAQ with prejudice and agree to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ. On November 22, 1989, the court preliminarily approved settlement of plaintiffs' claim against LAQ and ordered notice of the proposed settlement to be mailed to all members of the class on or about December 29, 1989. Any class member objecting to the proposed settlement was given until January 28, 1990 to file their objection and, if desired, notice of their intention to appear at the hearing on final approval of the settlement. A hearing was held on February

12, 1990 and the court makes the following determination pursuant to Fed. R. Civ. P 23(e).

Rule 23(e) requires the court to review the proposed settlement to make sure that the rights of the absent class members are not jeopardized by the settlement.[1] The court, by approving the settlement, finds the settlement to be fair, reasonable and adequate to all members of the class. *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3rd Cir. 1974). This does not mean that the court should substitute its judgment for that of the members of the class. 7b C. Wright, A. Miller & M. Kane *Federal Practice and Procedure*, § 1797 (1986). Any doubts about settling should also be tempered by the general policy favoring settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1985).

Factors that should be considered in approving or disapproving class settlements include:

1. The complexity, expense and likely duration of the litigation.
2. The reaction of the class to the settlement.
3. The stage of the proceedings and the amount of discovery completed.
4. The risks of establishing liability.
5. The risks of establishing damages.
6. The risks of maintaining the class action through the trial.
7. The ability of the defendants to withstand a greater judgment.
8. The range of reasonableness of the settlement fund in light of the best possible recovery.

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[1] Rule 23(e) states:

> Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

9. The range of reasonableness of the settlement fund to a possible recovery in light of all the possible attendant risks of litigation.

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975), *quoting, City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974).

Complexity

The complexity of this action is unquestioned. The plaintiff class is comprised of in excess of 35,000 public and not for profit private schools and school districts. The 52 original defendants represent most of the miners, millers, suppliers and manufacturers of friable asbestos building products. The case was originally filed in 1983, almost seven years ago. Class certification appeals were taken to the Supreme Court. The Third Circuit has stated that the facts giving rise to this case represent "an unprecedented situation. . . ." *In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3rd Cir.), *cert denied*, 479 U.S. 915 (1986).

Class Reaction

Three members of the class filed objections to the settlement, one of which was withdrawn prior to the February 12, 1990 hearing.

Redmond School District of Redmond, Oregon objected that the settlement amount was too small when apportioned pro rata among the various members of the class. In light of LAQ's position in the asbestos industry and peripheral involvement in this case, discussed *infra*, this settlement amount appears to be adequate.

The Akron City School District Board of Education (Akron) also filed an objection to the proposed settlement. Akron's objection is founded upon its uncertainty concerning its status as a member of the class. On March 27, 1989, Pretrial Order No. 183 was entered enjoining several

class members from litigating individual claims against National Gypsum. Although National Gypsum sought an injunction against Akron, Akron was not enjoined. Upon reconsideration of Pretrial Order No. 183, Pretrial Order No. 205 was issued and Akron was enjoined from pursuing its individual claim. While Akron acted quickly in filing its objection in order to preserve its right to inspect the settlement agreement, the right to supplement its objection was specifically reserved. *Akron Memorandum in Opposition to Proposed Settlement*, at 3. Since filing their objection, Akron has discovered no reason to question the fairness, reasonableness or adequacy of the LAQ settlement. Whether or not Akron's motion for Reconsideration of Order 205 is granted, Akron stands to lose nothing as a result of the LAQ settlement since Akron has agreed to dismiss LAQ as a defendant in its individual action. *Akron City School District Board of Education v. Armstrong World Industries*, No. CV 85 4 1242, Order (Ohio C.P. May 19, 1989).

The Stage of the Proceedings

Plaintiffs and LAQ have completed considerable discovery in order for plaintiffs to evaluate the relative strengths and weaknesses of their case against LAQ.

Risk of Establishing Liability

Plaintiffs recognize that they face a significant risk in attempting to establish liability against LAQ. LAQ, as a miner of asbestos, will assert unique defenses. For example, LAQ has indicated that it would assert that it sold a raw material to sophisticated buyers that materially altered the product, thereby making them not liable. Further, discovery has shown that LAQ started mining asbestos after 67% of the plaintiffs' schools had been built, that 70% to 75% of LAQ's product was sold overseas and that LAQ mined a fiber unsuitable for the friable asbestos-containing products at issue in this action.

Risk of Establishing Damages

Along with their peripheral position in this litigation, LAQ has compiled an impressive record in asbestos property damage actions. Of the approximately 90 actions filed against LAQ, it remains as a defendant in only about 20. In none of these actions has LAQ been held liable. In fact, LAQ has previously settled only one asbestos property damage claim. Against this background, plaintiffs would be justified in determining that the task of establishing damages against LAQ is herculean.

Maintaining the Class Action

The risks of maintaining the class action through the trial cannot be discounted. Defendants have vigorously fought the certification of the class and have asserted numerous procedural and substantive defenses. In an action this complex, plaintiffs can never be assured of an eventual victory at trial.

Withstanding a Greater Judgment

While it is not disputed that LAQ could financially withstand a greater judgment, given LAQ's peripheral position in this action, withstanding a greater judgment is not an issue in approving this settlement.

Reasonableness of the Settlement Fund

In light of all of the risks of continuing against LAQ, the recovery in this settlement appears to the court to be very reasonable.

Defendants' Objections

Generally, non-settling defendants have no standing to object to a proposed settlement since they would have no standing to appeal. Pretrial Order No. 66 provides the only

exceptions are when the rights of non-settling defendants are prejudiced by the settlement or non-settling defendants are precluded from seeking indemnification from settling defendants. *See, In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979). The non-settling defendants have failed to show that either of these exceptions are applicable here.

Accordingly, I find the proposed settlement agreement to be fair, reasonable and adequate for the members of the class. Plaintiffs' motion to strike the objections of the non-settling defendants is dismissed as moot.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 90-1247 & 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER
MANHEIM TOWNSHIP SCHOOL DISTRICT
LAMPETER-STRASBURG SCHOOL DISTRICT
and
NORTHEASTERN SCHOOL DISTRICT

Appellees,

vs.

LAKE ASBESTOS OF QUEBEC, LTD., THE CELOTEX CORPORATION, RAYMARK INDUSTRIES, INC., UNION CARBIDE CORP., ASBESTOSPRAY CORP., SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO., SPRAYED INSULATION, INC., ASBESTOS FIBRES INC., DANA CORPORATION, U.S. GYPSUM, U.S. MINERAL PRODUCTS COMPANY, SPRAYON INSULATION & ACOUSTICS, INC., SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO., INC., WILKIN INSULATION COMPANY, W.R. GRACE & CO., OWENS-CORNING FIBER-GLAS CORPORATION, STANDARD INSULATION, INC., NORTH AMERICAN ASBESTOS CORPORATION, CASSIAR RESOURCES LTD., BELL ASBESTOS MINES, LTD., ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE CORP., OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED, THE FLINTKOTE CO., FIBREBOARD CORPORATION, GAF CORP., UNIROYAL, INC., CAPE ASBESTOS, PFIZER, INC., KAISER CEMENT CORPORATION, BES-TEX, INC., GEORGIA-PACIFIC CORP.

Kaiser Cement Corporation,
Appellant No. 90-1247

United States Gypsum Company,
Appellant No. 90-1248

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 83-0268)

PRESENT: SCIRICA, COWEN and ALDISERT,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 19, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 21, 1990, be and the same is hereby affirmed. Costs taxed against the appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/

Clerk

Costs taxed in favor of Barnwell Sch Dist. as follows:

Briefs $156.00

December 13, 1990

Certified as a true copy and issued in lieu of a formal mandate on January 23, 1991

Test: /s/

Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: SCHOOL ASBESTOS LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

FILED

FEB 20 1990

MICHAEL E. KUNZ, Clerk

JUDGMENT PURSUANT TO F.R.CIV.P. 54(b)
AND PRETRIAL ORDER NO. 212 FINALLY APPROVING
1989 AGREEMENT OF SETTLEMENT WITH
DEFENDANT LAC D'AMIANTE DU QUEBEC, LTEE

WHEREAS, certain class actions consolidated as *In re Asbestos School Litigation*, Master File No. 83-0268 (E.D. Pa.) (hereinafter, the "Class Actions"), have been filed in this Court on behalf of an asserted class (hereinafter, the "Class") alleged therein against, *inter alia*, Lac d'Amiante Du Quebec, Ltee (hereinafter "LAQ").

WHEREAS, on March 31, 1989, class plaintiffs and defendant LAQ (hereinafter, "Settling Defendant") entered into a settlement agreement, entitled "Settlement Agreement With Defendant Laq d'Amiante Du Quebec, Ltee" (hereinafter, the "Partial Settlement");

WHEREAS, on November 22, 1989, Pretrial Order No. 198 was entered by this Court preliminarily approving the Partial Settlement and directing that notice be given to the class of the proposed Partial Settlement, and of a

hearing to determine whether the proposed Partial Settlement should be approved as fair, adequate and reasonable and to hear any objections thereto;

WHEREAS, such a hearing was held, as noticed, on February 12, 1990, and, prior to the hearing, proof of notice of the proposed Partial Settlement was presented and filed, on February 9, 1990;

WHEREAS, notice of the Partial Settlement was sent to all members of the Class certified in Pretrial Order No. 20, excluding all schools which filed a request to be excluded from the class pursuant to Fed.R.Civ.P. 23(c)(2), which notice advised class members of their right to appear at the hearing in support of or in opposition to the proposed Partial Settlement;

WHEREAS, the Court has heard counsel on behalf of the parties, and has reviewed all of the submissions presented with respect to the proposed Partial Settlement.

NOW, THEREFORE, on this 16th day of February, 1990, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The members of the Class referenced hereinafter consist of all schools as defined in Pretrial Order No. 20, excluding all schools which filed a timely and valid request to be excluded from the Class pursuant to Fed.R.Civ.P 23(c)(2).

2. The Partial Settlement is in all respects fair, adequate, reasonable and proper, and in the best interests of the Class, and is approved.

3. Notice of the proposed Settlement, as required by Rule 23(e) of the Federal Rules of Civil Procedure, has been given in an adequate and sufficient manner, complying in all respects with such Rules and due process, including, but not limited to, the forms of notice and the methods of identifying and giving notice to the Class.

4. Except as provided herein, these Class Actions are dismissed with prejudice and on the merits and without costs only to Settling Defendant. This dismissal shall apply to these class actions and all claims, demands, rights or causes of action (including all claims for punitive damages, costs, expenses or fees), present or future, known and unknown relating to asbestos and asbestos-containing materials, which the class, individually or collectively, and their predecessors or successors, of any of their past or present representatives, assigns, subsidiaries, divisions, affiliates, parents, partners, officers, directors, employees or agents, had, now has or hereinafter can, shall or may have against LAQ or any other person in connection with, arising out of, based in while or in part on, or in any way related to facts, matters, acts of commission or omission, statements, agreements or occurrences which were asserted or could have been asserted in any of the complaints and amended complaints in these class actions (hereinafter, the "Claims").

5. Plaintiffs and each and every member of the Class are hereby deemed to have constructively released all Claims against LAQ as if they had individually executed a Release and Covenant Not to Sue in the form of Exhibit A attached to the Partial Settlement agreement and incorporated herein.

6. Jurisdiction is hereby retained as to all matters related to the administration and consummation of the Partial Settlement hereby approved.

7. This Order and the Partial Settlement are not intended and are not be construed as a release or dismissal by plaintiffs and Class Members of any claims or rights which any of them have or may have against any non-settling defendant or defendants.

8. The Court finds that there is no just reason for delay in the entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and the Clerk of the

District Court is directed to enter this Judgment. Certification under Rule 54(b) will not result in unnecessary appeallate review nor will review of the adjudicated claims moot any further developments in this case. Even if subsequent appeals are filed, the nature of these claims are such that the appellate court would have have to decide the same issue more than once.

It is further ORDERED that plaintiff's motion to strike the objections of certain defendants is DISMISSED AS MOOT.

BY THE COURT:

/s/

JAMES McGIRR KELLY, J.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 90-1125

IN RE: SCHOOL ASBESTOS LITIGATION
KAISER GYPSUM, INC.,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45
Respondent.

No. 90-1126

IN RE: SCHOOL ASBESTOS LITIGATION
UNITED STATES GYPSUM COMPANY,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL
DISTRICT, BOARD OF EDUCATION OF THE
MEMPHIS CITY SCHOOLS, and a
Conditionally Certified Class,
Respondents.

No. 90-1185

IN RE: ASBESTOS SCHOOL LITIGATION
FIBREBOARD CORPORATION,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL
DISTRICT, BOARD OF EDUCATION OF THE
MEMPHIS CITY SCHOOLS, and a
Conditionally Certified Class,
Respondents.

No. 90-1199

IN RE: ASBESTOS SCHOOL LITIGATION
W. R. GRACE & CO.,
Petitioner,

v.

THE HONORABLE JAMES McGIRR KELLY,
Nominal Respondent,

and

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL

DISTRICT, BOARD OF EDUCATION OF THE
MEMPHIS CITY SCHOOLS, and a
Conditionally Certified Class,

Respondents.

Consolidated Petitions for a Writ of Mandamus or Prohibition to the Honorable James McGirr Kelly. United States District Court for the Eastern District of Pennsylvania (D.C. Civil Master File No. 83-0268)

Nos. 90-1125, 90-1126 & 90-1185
Argued: September 19, 1990
No. 90-1990 Submitted under
Third Circuit Rule 12(6):
September 19, 1990

Before: SCIRICA, COWEN and ALDISERT,
Circuit Judges.

(Filed December 13, 1990)

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OF COUNSEL TO RESPONDENTS

OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

These proceedings arise out of an on-going federal diversity class action, *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986), and require us to decide whether to grant the petitioners' requests for a writ of mandamus or prohibition directing the district court to dismiss the class action complaints for lack of subject matter jurisdiction. Because we conclude that the petitioners have not met their burden of showing a "clear and indis-

putable" lack of subject matter jurisdiction over the class, we will deny the consolidated petitions for a writ of mandamus in Nos. 90-1125 and 90-1185, and the petition for a writ of prohibition in No. 90-1126. We also consolidate with these petitions W. R. Grace & Co.'s petition for a writ of prohibition in No. 90-1199, and will deny it as well.

I.

On January 17, 1983, the class action giving rise to these petitions was filed in the district court on behalf of a national class consisting of all public and private elementary and secondary schools throughout the country. The complaints alleged claims against approximately fifty manufacturers and producers of asbestos-containing materials, which purportedly were used in the construction of some of the class plaintiffs' school buildings. On September 28, 1984, the district court certified the class action pursuant to F.R.Civ.P. 23(b)(3), and we affirmed the class certification on May 1, 1986. *In re Asbestos School Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). In 1989, several defendant manufacturers requested the dismissal of the federal class action of certain unnamed members on the basis that (1) not every class member has a claim in excess of the $10,000 jurisdictional amount; (2) complete diversity of citizenship between all absent class members and all defendants is required in a diversity-based class action; and (3) asbestos property damage claims are "local actions" involving real estate and may only be brought in the state where the real estate is located. After briefing and oral argument, the district court issued Pretrial Order No. 191 on May 1, 1989, directing the class plaintiffs to amend their complaints to conform with 28 U.S.C. § 1332(a). The plaintiffs accordingly amended their complaints to allege an amount in controversy of $10,000 for each plaintiff class member except a hypothetical small number of school districts, not yet identifiable, that only

have asbestos inspection costs under $10,000. The complaints also averred that the citizenship of each named class representative was diverse from that of each defendant manufacturer.

On November 15, 1989, after several defendants had filed challenges to the amended complaints, the district court issued Pretrial Order No. 197 in which it declined to dismiss the class action for lack of subject matter jurisdiction. In its memorandum and order, the district court observed that *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), requires dismissal of only those class members who fail to meet jurisdictional amount requirements. Because those plaintiffs could not be readily determined, the district court concluded that "[a]ny potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000." App. at 2-3. The district court also determined that complete diversity between all class members and all defendants is not required, and that the "local action" doctrine is inapplicable to the asbestos property damages claims in this class action. App. at 4-6.

After the district court refused to certify Order No. 197 for interlocutory review under 28. U.S.C. § 1292(b), two defendant manufacturers, Kaiser Gypsum Company, Inc. (No. 90-1125) and Fibreboard Corporation (No. 90-1185), filed petitions for a writ of mandamus directing the district court to dismiss the pending complaints and to refrain from any adjudication on the merits until the plaintiffs have cured all jurisdictional defects. A third defendant, United States Gypsum Company, filed a petition for writ of prohibition (No. 90-1126), in which W. R. Grace & Co. joined (No. 90-1199), seeking similar relief. These are the four petitions consolidated before us.

II.

Federal courts have the power to issue writs of mandamus or prohibition under the All Writs Act, 28 U.S.C. § 1651(a), which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." That two petitioners in this case have requested a writ of mandamus and two have requested a writ of prohibition is unimportant; it does not affect the relief requested. Although a writ of mandamus may appear more appropriate when the request is for an order mandating action, and a writ of prohibition may be more accurate when the request is to prohibit action, modern courts have shown little concern for the technical and historic differences between the two writs. 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3932 (1977 & Supp. 1990); *see Ex parte Simons*, 247 U.S. 231, 239-40 (1918); *Jenkins v. Weinshienk*, 670 F.2d 915, 917 n.1 (10th Cir. 1982). Under the All Writs Act, the form is less important "than the substantive question [of] whether an extraordinary remedy is available." *In re Davis*, 730 F.2d 176, 181 & n.10 (5th Cir. 1984).

The Supreme Court admonishes federal appellate courts to exercise their writ power with caution. *Kerr v. United States Dist. Court*, 426 U.S. 394, 402 (1976); *see DeMast v. Weiss*, 669 F.2d 114, 116- 17 (1982). Because the remedy is so extreme, courts should invoke it only "in extraordinary situations." *Kerr*, 426 U.S. at 402. Traditionally, federal courts have used the power "only to confine inferior courts to their lawful jurisdiction or to compel them to exercise authority when they have a duty to do so." *DeMast*, 669 F.2d at 117 (citing *Will v. United States*, 389 U.S. 90, 95 (1967)). In defining "jurisdiction," the Supreme Court has avoided a "narrow and technical" construction,

directing that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will*, 389 U.S. at 95 (quoting *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)).

Two important policy considerations support the concept that writs of mandamus or prohibition should be granted only sparingly. First, mandamus actions " 'have the unfortunate consequence of making the [district court] judge a litigant . . . ' in the underlying case." *Kerr*, 426 U.S. at 402 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384-85 (1953)). Second, frequent use of writs of mandamus would ignore the important judicial goal of avoiding piecemeal appellate review. *Kerr*, 426 U.S. at 403; *DeMast*, 669 F.2d at 117.

To ensure the use of writs in only "extraordinary situations," the Supreme Court has established two prerequisites to the issuance of a writ: (1) that the petitioner have no other "adequate means to attain the [desired] relief," and (2) that the petitioner meet its burden of showing that its right to the writ is "clear and indisputable." *Kerr*, 426 U.S. at 403; *see DeMast*, 669 F.2d at 117. Once these two prerequisites are met, the court's decision of whether to issue the writ is largely one of discretion. *Kerr*, 426 U.S. at 403.

III.

Although recognizing constraints on the federal courts' writ power, the petitioners argue that mandamus or prohibition generally is appropriate to prevent the district court from acting outside its jurisdictional authority. We agree. Courts traditionally have employed writs to restrain jurisdictional excesses, particularly when a lower court has acted without authority to do so. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). However, mere doubt regarding the trial court's subject matter jurisdiction is in-

sufficient to invoke a court's writ power. Justice Brandeis, speaking for the Court, has stated:

> If the lower court is clearly without jurisdiction, the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. If, however, the jurisdiction of the lower court is doubtful . . . or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record . . . or if the complaining party has an adequate remedy by appeal or otherwise . . . the writ will ordinarily be denied.

Ex parte Chicago, R. I. & Pac. Ry., 255 U.S. 273, 275-76 (1921) (citations omitted); *see In re Thornburgh*, 869 F.2d 1503, 1517-18 (D.C. Cir. 1989) ("We do not find the 'clear and indisputable' lack of jurisdiction in the district court . . . that is necessary to warrant a writ of mandamus."). Thus, only if the petitioners show that the district court's lack of subject matter jurisdiction is "clear and indisputable" and that no other adequate means exists to attain relief should we grant the extraordinary relief requested in these petitions.

The petitioners suggest three jurisdictional defects supporting their request for a writ of mandamus or prohibition: (1) not every class member has a claim in excess of the then-applicable $10,000 jurisdictional amount; (2) complete diversity of citizenship between all absent class members and all defendants is required in a diversity-based class action; and (3) asbestos property damage claims are "local actions" involving real estate and may only be brought in the state where the real estate is located. For the reasons stated below, none of these arguments demonstrates the district court's "clear and indisputable" lack of subject matter jurisdiction over the class.

The petitioners also argue that pendent party jurisdiction is not available to the class plaintiffs in lieu of federal

diversity subject matter jurisdiction. Because we decide that the petitioners have failed to meet their burden of showing that diversity jurisdiction does not exist, we need not reach their claim of lack of pendent party jurisdiction.

IV.

The petitioners first contend that the class plaintiffs (the respondents) have not met their burden of pleading the $10,000 jurisdictional amount in controversy required under former 28 U.S.C. § 1332(a) (Congress since has amended the statute to require an amount in controversy of $50,000). In their amended complaints, the class plaintiffs conceded that a hypothetical small portion of the class will not be able to meet the amount in controversy. However, the petitioners claim that as many as sixty percent of the school districts will not be able to meet the jurisdictional amount because, according to an EPA report, they do not have friable asbestos-containing materials in one or more of their buildings.

It is well established that "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case. . . ." *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973). However, as noted in the district court's memorandum and order, *Zahn* does not require that an entire class action be dismissed for lack of subject matter jurisdiction over some of the class members. Rather, the court is required only to dismiss those class members whose claims appear to a "legal certainty" to be less than the jurisdictional amount. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

Because it was not apparent which class plaintiffs should be dismissed, the district court chose to delay dismissing any plaintiffs until it is shown *at trial* that their claims do not meet the jurisdictional amount. Relying on F.R.Civ.P. 12(d), the district court noted that "[a]ny po-

tential jurisdictional problems raised in this case [could] be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000." App. at 2-3.

Under F.R.Civ.P. 12(d), a judge who is deciding a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may postpone the decision until trial. The rule specifically provides that a Rule 12(b) motion, "whether made in a pleading or by motion, . . . shall be heard and determined before trial on application of any party, *unless the court orders that the hearing and determination thereof be deferred until the trial.*" F.R.Civ.P. 12(d) (emphasis added).

At this juncture, we are constrained to note how the dissent construes the action of the district court here. It interprets the district court's language, "potential jurisdictional problems . . . be cured *at* trial," to mean *after* trial (emphasis added). Thus, it states that the district court's order purported to " 'cure' the jurisdictional deficiency *after* trial." Dissenting opinion typescript at 4 (emphasis added); to "postpon[e] the resolution of a jurisdictional failure until *after* trial," *id.* (emphasis in original); to defer "resolution of the jurisdictional question until after a trial," *id.* at 9 n.4; to sanction dismissal only "where a plaintiff has failed to establish damages for less than the jurisdictional minimum after trial," *id.* at 12; and to postpone "resolution of jurisdictional questions until after trial," *id.* at 13.

We believe that the dissent's interpretation is both unfair and inaccurate. The district court's language "*cured at trial*" is free from ambiguity and is consistent with the clear authority of Rule 12(d) permitting the jurisdictional decision to be "deferred until the trial."

The Court of Appeals for the Sixth Circuit, in *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988),

has considered the effect of Rule 12(d). In *Sterling*, the defendant had filed two separate Rule 12(b)(1) motions seeking pretrial dismissal of the class action because certain representative class plaintiffs did not allege the appropriate amount in controversy. Rather than immediately dismissing any plaintiffs' claims, the district court deferred the jurisdictional decision until trial. The trial judge observed:

> [I]t also seems to me that it is not necessary *at this point* for the court to wholesale order a dismissal of all those potential class members who may not at this point have pleaded, because it seems to me that's a matter that might well come up at some point down the road after the initial phase of the case is tried. . . . *[W]hen you get down to establishing amounts in a case such as this, where there is a jury trial, it puts a burden on the court that the court really doesn't want to undertake*, and that is an assessment of claims at this point to try and make a determination of whether a jurisdictional amount, in fact, can be asserted at this point. . . .

Id. at 1195 n.5 (emphasis added). The appellate court determined that the trial judge's action was not improper. Moreover, the court observed that the "method and timetable" for deciding a Rule 12(b) motion is "left to the *sole* discretion of the trial judge." *Sterling*, 855 F.2d at 1195 (emphasis added).

As noted by the district court, however, only one of the motions to dismiss in this case was a Rule 12(b)(1) motion; the other was premised on Rule 12(h)(3). Thus, even if we apply Rule 12(d) to the 12(b)(1) motion, we still must consider the language in Rule 12(h)(3).

Rule 12(h)(3) provides that subject matter jurisdiction can never be waived: "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

However, we find that Rule 12(h)(3) does not require dismissal at this juncture because (1) it is not clear that the district court lacks jurisdiction over the subject matter, and (2) a court does not have to dismiss a claim if the jurisdictional failure can be cured. *See Freistak v. Egger*, 551 F. Supp. 238, 241 (M.D. Pa. 1982); *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 169 F. Supp. 774 (D.C. Cal. 1958), *rev'd on other grounds*, 362 U.S. 73 (1960); *see also* 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § 1393, at 772-73 (1990).

To accept the argument advanced by the petitioners, we would have to conclude that Rule 12(h)(3) nullifies the unequivocal language of Rule 12(d): "The defense[ ] specifically enumerated (1) . . . in subdivision (b) of this rule [lack of jurisdiction over the subject matter] . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." We do not believe that nullification of Rule 12(d) was Congress's intent in approving the Rule 12(h)(3) submission of the Advisory Committee on Civil Rules. We do not believe also that Rule 12(h)(3) requires the district court to rule immediately upon the presentation of a motion to dismiss; we believe that in *ipsissimis verbis* Rule 12(d) authorizes the district court to defer the hearing and determination.

Because we think that the two provisions must be integrated to provide consistency and be accorded full meaning, we hold that Rule 12(h)(3) invests the district court with the *power* to dismiss the action, and that Rule 12(d) discloses *when* this power may be exercised. Any other interpretation would mean that Rule 12(h)(3) strips away completely the discretionary authority conferred in Rule 12(d) when a lack of subject matter jurisdiction is raised.

Applying Rules 12(d) and 12(h)(3) and the rationale in *Sterling*, we conclude that the district court had the discretionary authority to delay until trial the dismissal of

those class members that cannot meet the amount in controversy. Postponing dismissal of such plaintiffs not only appears prudent, but it meshes with our policy. In *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971), we stated that "[I]t is our intention to require removal from the trial list of those 'flagrant' cases where it can be determined in advance 'with legal certainty' that the congressional mandate of $10,000 minimum was not satisfied." *Id.* at 292. This federal class action is not one of those "flagrant" cases. Conceding that some of the class plaintiffs will not meet the jurisdictional amount, the district court is willing to dismiss such plaintiffs once they are identified at trial. We find no abuse of discretion in this approach.

V.

The petitioners next argue that the class must be dismissed due to lack of complete diversity of citizenship. They mount the novel contention that under 28 U.S.C. § 1332(a)(1) the citizenship of each class plaintiff must be diverse from the citizenship of each defendant manufacturer. We reject this argument.

From settled class action cases emerges the precept that in a federal class action only the citizenship of the named class representatives must be diverse from that of the defendants. *Snyder v. Harris*, 394 U.S. 332, 340, *reh'g denied*, 394 U.S. 1025 (1969); *see In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 162 (2d Cir. 1987); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.95, at 23-546 (2d ed. 1987); C. Wright, *Law of Federal Courts* § 31, at 170 (4th ed. 1983); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3606, at 424 (1984 & Supp. 1990). What petitioner Kaiser Gypsum Co., Inc. describes in its brief as "dictum in *Snyder v. Harris*," Petitioner's Brief at 23, the Court of Appeals for the Second Circuit describes as "hornbook law, based on 66 years of Supreme Court precedent":

Although we understand the need to preserve issues for further review, we confess a certain surprise at the vigor with which this argument was pressed in this court and the amount of time that was devoted to it at oral argument. It is hornbook law, based on 66 years of Supreme Court precedent, that complete diversity is required only between the named plaintiffs and the named defendants in a federal class action. 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3606, at 424 (2d ed. 1966) ("[t]he courts look only to the citizenship of the representative parties in a class action"). As the Supreme Court noted in *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053, 22 L.Ed. 2d 319 (1969):

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 [41 S. Ct. 338, 65 L.Ed. 673] (1921).

394 U.S. at 340, 89 S. Ct. at 1059. . . . Thus, if appellants' theory of class action jurisdiction is to become law, this must be done by the Supreme Court.

Agent Orange, 818 F.2d at 162. The trial courts in this circuit have not questioned this precept. *Pirrone v. North Hotel Assocs.*, 108 F.R.D. 78, 83 n.2 (E.D. Pa. 1985); *McMahon Books, Inc. v. Willow Groves Assocs.*, 108 F.R.D. 32 40 n.5 (E.D. Pa. 1985). Because the complaints in the case before us properly allege that the citizenship of the named class representatives is diverse from that of the defendants, the requisite diversity of citizenship is present.

The petitioners unconvincingly argue that *Finley v. United States*, 109 S. Ct. 2003 (1989), overruled *Snyder* sub silentio. They claim that *Finley* requires complete diversity of citizenship between all class plaintiffs and all defendants in Rule 23(b)(3) class actions. This argument is unimpressive for several reasons.

First, *Finley* does not even address the *Snyder* rule. The only issue before the court in *Finley* was whether the Federal Tort Claims Act "permits an assertion of pendent jurisdiction over additional parties." *Id.* at 2005. Relying on precedent rejecting pendent party jurisdiction, *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978); *Aldinger v. Howard*, 427 U.S. 1 (1976); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Court held that a "grant of jurisdiction over claims involving particular parties does not itself confer jurisdiction over additional claims by or against different *parties*." *Finley*, 109 S. Ct. at 2010 (emphasis added).

At no point did the Supreme Court even allude to the diversity requirement in federal class actions. Surely, if *Finley*'s objective was to overrule *Snyder* by implication and to require complete diversity between all plaintiffs and all defendants in class actions, the Court at least would have made direct or indirect reference to the subject. The Court knows how to state explicitly that a previous decision is no longer to be followed; it knows how to frame a precept in the form of a major premise in which the rules of logic support an implication that a previous holding is threatened; it also knows how to send signals that it will be reconsidering a previous ruling. No such reference to diversity class actions—by express direction, implication or signal-sending—is present in *Finley*. To suggest that a subliminal message can be found therein, as urged by the petitioners here, is to concoct a fictitious extravaganza that has no place in a serious argument before this court. The petitioners have not submitted a single case supporting their position that *Finley* has obliterated the

teachings of *Snyder v. Harris*; nor has our independent research discovered any such decision.

Moreover, counsel for United States Gypsum Co. and Kaiser Cement Corp. candidly explained at oral argument the motive behind their argument that *Finley* now requires complete diversity of all members of the class. Counsel stated that the purpose was to destroy nationwide federal diversity class actions:

> THE COURT: [I]f we will accept your subject matter jurisdiction arguments and those of your colleague or your friend who just argued——
>
> MR. KIRBY: Both.
>
> THE COURT:—that what this is actually doing is really virtually precluding class actions in diversity matters?
>
> MR. KIRBY: Nationwide class actions would, we sincerely hope, be dead.

Transcript of Oral Argument at 78-79, *In re Asbestos School Litig.*, ___ F.2d ___ (3d Cir. 1990) (Nos. 90-1247 & 90-1248). Here we must proceed with caution. It is for the Congress, not the courts, to legislate changes in the diversity laws.

In 1988 Congress reconsidered the diversity jurisdiction of the federal courts. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (partly codified as amended at 28 U.S.C. § 1332). Although the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice strongly recommended that "virtually all of the Federal court jurisdiction based on the citizenship of the parties" be eliminated, the full Committee on the Judiciary rejected this proposal, suggesting instead that the jurisdictional amount in controversy be raised from $10,000 to $50,000. H.R. Rep. No. 100-889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 5987-88. One of the principal rea-

sons the Committee rejected the complete abolition of diversity jurisdiction was the opposition of key officials responsible for state court systems. Siegel, *Commentary on 1988 Revision*, in 28 U.S.C. § 1332 (West Supp. 1990). Congress accepted the Committee's compromise and voted merely to raise the amount in controversy. *Id.* Notwithstanding the discussions regarding abolition, Congress did not make any attempt in its 1988 revision to exempt federal class actions from diversity jurisdiction.

The legislative history of 28 U.S.C. § 1332 and the Congressional endorsement of Rule 23(b)(3) class actions manifest Congress's support of diversity-based class actions. If the petitioners wish to sound the death knell on such class actions, their sounding board is the Congress and not this court.

VI.

Petitioner Kaiser Gypsum Company also contends that because the "local action" doctrine applies to any action directly affecting land and real property, the district court's subject matter jurisdiction is limited by the doctrine to claims related to property located in Pennsylvania. The district court rejected this argument, determining that the plaintiffs' claims are "largely tort claims," which are "transitory" rather than "local" in nature.

The law distinguishes between transitory and local actions. Local actions are essentially *in rem* and may only be prosecuted "where the thing on which they are founded is situated." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3822, at 204-05 (1986) (quoting *Casey v. Adams*, 102 U.S. 66, 67-68 (1880)). A transitory action may be brought wherever venue is proper. *Id.*

The class plaintiffs cite *Dayton Indep. School Dist. v. U.S. Mineral Prods. Co.*, No. B-87-00507-CA (E.D. Tex. Feb. 14, 1989), as authority for their contention that this

class action is transitory. In an action involving the same allegations and legal theories as this case, the *Dayton* court held:

> Such claims sound primarily in *product liability and in tort.* The gravamen of Plaintiff's complaint is that the presence of Defendants' products in their buildings poses a health risk to building workers and occupants which must be addressed.
>
> In several years of managing large multi-plaintiff asbestos litigation such as the cases presently before the Court, there has been no occasion to consider title to or possession of any of the buildings which contain the asbestos products at issue, or to resolve any issues involving principles of property law. The parties may use whatever terms they please to describe these cases, but the fact remains that, regardless of the nomenclature used, *these claims are transitory in nature rather than local in nature.* Suits such as these asbestos cases do not involve title to or possession of land such as would be governed by the local action doctrine. Rather, the Plaintiffs are seeking to recover monetary damages arising out of the alleged manufacture and sale of defective products, which "might have taken place anywhere." *The local action rule is not applicable to Plaintiff's claim.*

Id. (emphasis added). The district court in this case conceded in its order that questions relating to the ownership of some of the school buildings may arise later in the litigation. App. at 6. As an alternative to dismissing the complaints now, the district court determined that it could dismiss those school districts for lack of subject matter jurisdiction once the local action doctrine is shown to apply.

We agree that it is premature to invoke the local action doctrine at this time. Because the alleged claims appear transitory and are not bound to any issues of title or

possession of real property, we reject Kaiser Gypsum's local action argument.

VII.

We conclude that petitioners have not met their burden of showing a "clear and indisputable" lack of federal diversity subject matter jurisdiction in this case. Because they have failed to establish this prerequisite to the issuance of a writ, the consolidated petitions for a writ of mandamus or prohibition will be denied.

COWEN, *Circuit Judge*, dissenting.

At issue in these consolidated Fed. R. Civ. P. 23(b)(3) asbestos class action appeals are two fundamental questions of federal jurisdiction. The first is whether a district court has the power to hear a class action suit under its diversity jurisdiction, 28 U.S.C.A. § 1332(a) (1966 & Supp. 1990), when there is substantial and uncontradicted evidence that a majority of the plaintiff class has less than the jurisdictional minimum amount in controversy in direct violation of the rule in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). The district court held that it had the power to hear the cases without dismissing the class members who lacked jurisdictionally sufficient claims as long as it only entered final orders with respect to those claims which after litigation prove to be in excess of the jurisdictional minimum.

The second issue is whether in a class action diversity suit there must be complete diversity between all members of the plaintiff class and all defendants, or whether it suffices for there to be diversity between only named plaintiffs who represent the plaintiff class and all defendants. The district court purported to follow a "well settled rule" which allows a class action to proceed even where complete diversity is lacking, provided that there

is complete diversity between named plaintiffs and all defendants.

The majority today holds that the district court was acting within the bounds of its jurisdiction in proceeding to the merits despite the jurisdictional defects. In so holding, the majority breaks new ground in the field of federal jurisdiction. Because I believe that the district court lacks jurisdiction over these consolidated class actions and that the majority's decision today is unsupported by precedent and lacks a theoretical foundation, I must dissent.

I.

All parties to this action agree that every plaintiff in a Rule 23(b)(3) class action must independently satisfy the amount in controversy requirement of section 1332(a) with a claim in excess of the jurisdictional minimum. *Zahn*, 414 U.S. at 301 ("Each plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.' ") (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)). Since only the main plaintiffs met the jurisdictional minimum in *Zahn*, the United States Supreme Court would not allow the suit to proceed as a class action. *See also Snyder v. Harris*, 394 U.S. 332 (1969) (separate claims in a class action suit could not be aggregated for the purpose of meeting the jurisdictional minimum amount in controversy requirement). *Zahn* requires that each distinct claim satisfy the jurisdictional minimum requirement because the Court interprets "matter in controversy" language in 28 U.S.C.A. § 1332(a) as relating to each claim in a class action suit, and not the total amount that might be claimed on the facts giving rise to the class action litigation. *Zahn*, 414 U.S. at 298-300.

All parties to this action agree that some of the represented plaintiffs in this class action do not have claims

meeting the jurisdictional minimum amount in controversy contained in former 28 U.S.C.A.§ 1332(a).[1] Indeed, plaintiffs have admitted in their amended complaints that some plaintiffs cannot in good faith allege claims in excess of $10,000.[2] Furthermore, defendants have introduced uncontradicted evidence that when this case was filed as much as 60% of the plaintiff class did not have claims

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[1] At the time plaintiffs filed these suits, the statutory authority which empowered federal courts to exercise diversity jurisdiction read:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C.A. § 1332(a) (1966).

[2] On May 30, 1989, after the district court entered Pretrial Order No. 191, which directed plaintiffs to file amended complaints conforming to the requirements of 28 U.S.C.A. § 1332(a), the named plaintiffs amended their complaint to allege:

> The plaintiff and all members of the class [*except a minimal portion thereof*], have claims in excess of $10,000 for costs incurred *inter alia* in the inspection of the school buildings, and all other costs incidental thereto, and costs of repairs and replacement plus punitive damages. *Entities (not now identified) may exist which* own or operate very small school systems in which no friable or potentially friable asbestos-containing material exists and for whom punitive damages may not be recoverable who *cannot allege $10,000 in controversy*. [emphasis added].

Defendants have shown that 60% of the plaintiff class cannot meet the jurisdictional minimum. Nor can the plaintiffs inflate their damage allegation by including punitive damages in the amount alleged as being in controversy, since the class was not certified to seek punitive damages or to recover for costs incurred in connection with inspecting for asbestos-containing materials. The class certification was limited to claims for damages arising from actually friable materials.

exclusive of interest and costs in excess of the jurisdictional minimum.

Notwithstanding the apparently uniform understanding that every plaintiff in a Rule 23(b)(3) class action must independently meet the jurisdictional minimum amount in controversy, and that some plaintiffs in this class action do not meet that requirement, the district court declined to dismiss from the suits plaintiffs whose claims are jurisdictionally insufficient. Instead, the district court concluded that it could "cure" the jurisdictional deficiency after trial by entering judgment on behalf of claims that proved to be in excess of $10,000. As support for this novel approach, the district court cited Rules 12(d) and 12(h)(3). Amazingly, the majority today allows the district court to proceed on that basis. Because there is no authority for postponing the resolution of a jurisdictional failure until *after* trial, I would grant the petition and order the writ of mandamus to issue directing that the amended complaint be dismissed.

At this juncture, I must respond to the majority's criticism that I have unfairly and inaccurately characterized the district court's action respecting the "amount in controversy" question. I state throughout my dissent that the district court has decided to postpone until *after* trial resolution of the jurisdictional questions. Maj. typescript op. at 14. I stand by this characterization.

This class action is certified to resolve the common factual questions that underlie the class members' claims in order to facilitate resolution of asbestos-in-school claims for property damage. Pre-Trial Order No. 235, entered May 17, 1990, identified the following common issues which will be resolved in the first phase of a bifurcated trial:

A. The level at which various kinds of friable asbestos, in various forms, is hazardous in school buildings.

B. Defendants' knowledge of the health hazards of asbestos.

C. Defendants' failure to properly warn or test.

D. Defendants' fraudulent concealment of knowledge of the dangers of asbestos.

E. Defendants' conspiracy to suppress knowledge of the dangers of asbestos.

F. Punitive damages.

G. Common defenses.

Pre-Trial Order No. 235. Resolution of these common factual questions will bring us no closer to determining which plaintiffs must be dismissed because they have jurisdictionally insufficient claims.

Indeed, the district court expressly stated in Pre-Trial Order No. 235 that "Determination of the conduct of any additional phase(s) shall be deferred until the completion of Phase I." Pre-Trial Order No. 235. In other words the identity of the plaintiffs who must be dismissed because they lack jurisdictionally sufficient claims will be deferred until *after* a trial resolving the common factual questions.

A.

Rule 12(d) allows a court to defer until trial certain Rule 12(b) dismissal motions, including a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Rule 12(h)(3) states, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

The argument the district court apparently accepted is that it does not appear the court lacks subject matter jurisdiction until a trial on damages demonstrates damages do not exceed the jurisdictional minimum. Hence, the dis-

trict court can defer resolution of the jurisdictional question until it has enough information to reach a supported conclusion. When it appears that the court lacks jurisdiction over a particular plaintiff; that is, at a damages stage trial, the party will immediately be dismissed from the case.

The primary problem with the district court's approach of deferring resolution of the jurisdictional question is that such questions must be resolved at the beginning of a case, not the end. *See Employers Ins. of Wausau v. Crown Cork & Seal Co. Inc.*, 905 F.2d 42, 45 (3d Cir. 1990) ("a federal court is bound to consider its own jurisdiction preliminary to consideration of the merits.") (quoting *Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n of Philadelphia*, 657 F.2d 29,36 (3d Cir. 1981)); *See also Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n*, 554 F.2d 1254, 1257 (3d Cir. 1977) ("federal courts should resolve any questions that they may have as to the existence of diversity before proceeding to a decision on the merits.")

Wausau was a diversity action in which the plaintiff insurance company sought a declaration pursuant to the Declaratory Judgment Act of the nature of its obligations arising from certain environmental liabilities that resulted from Wausau's issuance of general liability insurance. One of the defendants (which was not an insurance company) moved to realign the parties so that all the insurance companies with similar interests would be federal plaintiffs. The court declined to make findings on the motion for realignment (which would have created jurisdictional difficulties if granted). Instead, the district court stayed the federal action on the grounds that there was a state action already pending which would litigate the same questions. We vacated the district court's order and remanded for a resolution of the motion to realign. On remand, the district court would be required to resolve any jurisdictional questions before disposing of the case by stay or dismissal. We noted that "[t]he district court's grant of the stay amounts

to the exercise of its dominion over this matter, clearly presupposing that it had subject matter jurisdiction in the first instance. It was therefore bound to first consider [defendant]'s challenge to the diversity between the parties raised in [defendant]'s motion for realignment before it granted the stay." *Wausau*, 905 F.2d at 45. The same is true with respect to the challenge to the district court's subject matter jurisdiction in this case.[3]

Ignoring this Court's long-standing requirement that courts resolve jurisdictional questions at the beginning of a case, the majority relies on a recent decision by the Court of Appeals for the Sixth Circuit for the proposition that a district court may defer until trial the resolution of any jurisdictional questions. *See Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1195-96 (6th Cir. 1988).[4]

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[3] In requiring that the existence of diversity jurisdiction be resolved at the beginning of the case rather than the end, federal courts espouse well accepted principles of federalism. *See, e.g., Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.")

[4] Although I do not consider it to be a fatal flaw, I note that the majority cites *Sterling* and Rule 12(d) as authority for the proposition that a district court may postpone resolution of the jurisdictional question until a trial on the merits. In this case, the district court has deferred resolution of the jurisdictional question until *after* a trial on the merits and not merely until trial. That difference is substantial because 12(d) is the only authority the majority cites for postponing resolution of the question for so long.

There are situations where factual findings could determine the existence of subject matter jurisdiction in a diversity case. For instance, where there is a dispute about the location of a corporation's principal place of business and resolution of that dispute will determine whether diversity exists, it might make sense to defer resolution of that question until trial. *See, e.g., Village Fair Shopping Center Co. v. Sam Broadhead Trust*, 588 F.2d 431, 433 (5th Cir. 1979) (as regards diversity jurisdiction, the determination of a corporation's principal place of business

In *Sterling*, certain class action plaintiffs failed to allege in their complaints that they had claims in excess of the jurisdictional minimum for diversity cases. In response to defendant's motion under Rule 12(b)(1) to dismiss for want of subject matter jurisdiction, the district court, relying on Rules 12(d) and 12(h)(3), deferred resolution of the jurisdictional question until trial. The Sixth Circuit affirmed. At first blush, *Sterling* appears to support the majority's reading of Rules 12(d) and 12(h)(3). The facts of *Sterling*, however, reveal that *Sterling* does not contravene our long-standing rule that jurisdictional questions should be resolved before proceeding to the merits. *See Wausau*, 905 F.2d at 45; *Carlsberg*, 554 F.2d at 1257.Indeed, *Sterling*'s holding that the jurisdictional question may be deferred until trial is completely consistent with our holdings in *Wausau* and *Carlsberg*.

Rule 12(h)(3) requires that the district court dismiss an action "*[w]henever* it appears . . . that the court lacks jurisdiction of the subject matter. . . ." Fed. R. Civ. P. 12(h)(3) (emphasis added). When the defendants made the motion to dismiss for lack of subject matter jurisdiction

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is a question of fact). Nevertheless, the existence of a dispute as to a corporation's place of business would not excuse compliance with Rule 8(a)(1) which requires plaintiffs to plead in their complaint "a short and plain statement of the grounds upon which the court's jurisdiction depends. . . ." Where a plaintiff fails to show the grounds for federal jurisdiction in his complaint, the court must dismiss the case, unless the defect can be corrected by amendment. *Smith v. McCullough*, 270 U.S. 456, 459 (1926); *Randazzo v. Eagle-Picher Indus., Inc.*, 117 F.R.D. 557, 558 (E.D. Pa. 1987).

In the case before us, plaintiffs have failed to make sufficient jurisdictional allegation with respect to the amount in controversy of each represented plaintiff. Because plaintiffs have admitted this in their amended complaints, there is no factual question to resolve. The only question is which plaintiffs must be dismissed—not whether any plaintiffs will have to be dismissed. If plaintiffs cannot amend their complaints to make jurisdictionally sufficient allegations, their cases should be dismissed entirely.

in *Sterling*, there was no basis in the record for believing that any plaintiff would be unable to prove claims in excess of the jurisdictional minimum. Quite the contrary, it appeared that every plaintiff had a claim well in excess of the jurisdictional minimum. *Sterling*, 855 F.2d at 1195. The district court in *Sterling* decided that it was not required to dismiss plaintiffs who failed to allege claims in excess of the jurisdictional minimum when the court had no reason to doubt that any plaintiff would fail to prove a claim in excess of the amount required.

The plaintiffs whose pleading allegations were challenged in *Sterling* were plaintiffs either by virtue of the fact that they did not opt out of the class or had been permitted to join the representative plaintiff class under Rule 20(a). Counsel for the plaintiffs argued that it was unnecessary for the plaintiffs who joined the suit by failing to opt out to allege claims in excess of the jurisdictional minimum, since the original plaintiffs had already claimed jurisdictionally sufficient damages and the non-opt-out plaintiffs adopted the original plaintiff's *ad damnum* clause when they joined the suit.[5]

Sterling is a case about pleading rules.[6] No one in *Sterling* expressed serious doubt that any plaintiff, however he became part of the suit, would fail to demonstrate a claim in excess of the jurisdictional minimum. Indeed, plaintiff's counsel assured the court that each plaintiff had claims in excess of the minimum. *Sterling*, 855 F.2d at 1194-95.

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[5] The case does not indicate how plaintiffs' counsel responded to the objection that the plaintiffs who joined the suit under Rule 20(a) failed to allege jurisdictionally sufficient damages.

[6] To the extent that *Sterling* implies that it is ever permissible for a plaintiff's complaint to lack a jurisdictionally sufficient claim on its face, I disagree. It is the long standing rule that jurisdiction must exist on the face of a complaint in accordance with Rule 8(a)(1). *Smith v. McCullough*, 270 U.S. 456 (1926).

In this case, by contrast, plaintiffs have not only failed to allege that every plaintiff has a claim in excess of the jurisdictional minimum, but plaintiff has admitted in its amended complaint that some plaintiffs do not meet the jurisdictional minimum. Furthermore, defendants have introduced uncontradicted evidence that as much as 60% of the plaintiff class cannot meet the jurisdictional requirement. Plaintiffs cannot invoke Rules 12(d) and 12(h)(3) to save their suit because Rule 12(h)(3) requires that the court dismiss the suit "[w]*henever* it appears . . . that the court lacks jurisdiction of the subject matter . . . ." Fed. R. Civ. P. 12(h)(3) (emphasis added). It appears that the district court lacks jurisdiction *now*.[1] Accordingly, following the mandate of Rule 12(h)(3), *Carlsberg*, and even *Sterling*, the district court must require that the jurisdictional infirmities be cured *now*.

The majority's reliance on *Sterling* is also misplaced because 28 U.S.C.A. § 1332 does not contemplate dismissal for lack of jurisdiction where a plaintiff has failed to establish damages for less than the jurisdictional minimum after trial. If a prevailing plaintiff fails to establish dam-

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[1] The majority opinion has created a paper tiger by concluding that Rule 12(d) cannot be given effect unless we read Rule 12(h)(3) as conferring the power to dismiss for lack of subject matter jurisdiction on this court and Rule 12(d) states when that power may be exercised. The majority insists that any other reading of Rule 12(h)(3) would nullify the plain language of Rule 12(d). I disagree.

Professor Wright has explained when a jurisdictional challenge should be deferred. "If . . . a decision of the jurisdictional issue requires a ruling on the merits of the case, the decision should await a determination of the merits . . . ." 5A C. Wright & A. Miller, *Federal Practice and Procedure: Civil 2d* § *1350, at 225 (1990)* (collecting cases); *Id.*, § 1373, at 552-54 ("because of its significance, a defense of lack of subject matter jurisdiction usually will receive a hearing, unless its resolution cannot be achieved without a consideration of the merits of the action.") (collecting cases). I think that Professor Wright's construction of Rules 12(d) and 12(h)(3) gives effect to both rules without the strained logic the majority opinion requires.

ages meeting the minimum amount in controversy for diversity cases after trial, 28 U.S.C.A. § 1332(b) (1966 & Supp. 1990) authorizes the district court to deny plaintiff his costs, or even to impose costs on the prevailing plaintiff. 28 U.S.C.A. § 1332(b).* If the majority were correct in its analysis of Rules 12(b)(1), 12(d), and 12(h)(3), and its conclusion that a district court may postpone resolution of jurisdictional questions until after trial, 28 U.S.C.A. § 1332(b) would make no sense. Under the majority's reading of these authorities, if a plaintiff were awarded damages for less than the jurisdictional minimum after trial, the district court would dismiss the case for lack of subject matter jurisdiction. But that view was soundly rejected by the Supreme Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938) (a case cannot be dismissed for lack of jurisdiction if it contains a jurisdictionally sufficient allegation, but the plaintiff recovers less than the jurisdictional minimum). Either the district court has jurisdiction and a plaintiff with an inadequate claim is subject to an assessment of costs or the court lacks jurisdiction and the case must be dismissed. Since section 1332(b) explains what course to take if a prevailing plaintiff proves an inadequate claim after trial, it makes no sense to hold that the plaintiff's claim can be dismissed at that stage for lack of subject matter jurisdiction. Because I believe the district court is proceeding beyond its jurisdictional sphere by going to the merits without either dismissing the case or, at least, the plaintiffs whose claims are insufficient, I would issue the writ of mandamus.

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* 28 U.S.C.A. § 1332(b) read in relevant part:

> (b) Except where express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000 . . . the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff . . . .

B.

The majority has made much of the rule that a case will not be dismissed for lack of subject matter jurisdiction unless it appears to a "legal certainty" that the plaintiffs' claim is insufficient. In support of that proposition, the majority cites *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. at 289. *Red Cab* involved a case which had been removed from state court to federal court. Jurisdiction was invoked under the diversity statute then in effect which required that the plaintiff have at least $3000 in dispute. In the original state action, the plaintiff demanded $4000 and other appropriate relief. *Id.* at 285. After the case was removed to federal court, the plaintiff filed a second amended complaint which again alleged damages of $4000 resulting from an alleged breach of contract. Plaintiff had attached an appendix to the second amended complaint which listed specific amounts of damages resulting from the alleged breach of contract. The appendix, however, indicated damages of only $1,380.89. At trial the plaintiff prevailed, but the damage award was for only $1,162.98. *Id.* at 285.

On appeal, the Court of Appeals refused to decide the case on the merits because the plaintiff had a jurisdictionally insufficient claim after trial. The Supreme Court reversed on the ground that a complaint need only contain a good faith allegation that there is a jurisdictionally sufficient claim. *Id.* at 288 ("The rule governing dismissal for want of [subject matter] jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith."). In the case before us, plaintiffs have failed to plead jurisdictionally sufficient claims because, as they candidly admitted, they could not make such an allegation in good faith. *Red Cab* contains no authority for the proposition that the "legal certainty" test will save a pleading which is inadequate on its face.

Rather, the rule of *Red Cab* is that a case will not be dismissed for lack of subject matter jurisdiction where a plaintiff at trial has proven damages which are less than the jurisdictional minimum, notwithstanding the fact that if the plaintiff had alleged only that insufficient amount in the original complaint, the court would have been compelled to dismiss for lack of subject matter jurisdiction. This rule is entirely consistent with the language of 28 U.S.C.A. § 1332(b), which imposes costs on a prevailing plaintiff who after trial has failed to recover a claim that would be jurisdictionally sufficient.

This Court's "legal certainty" test in *Nelson* is not to the contrary. *Nelson v. Keefer*, 451 F.2d 289 (3d Cir. 1971). In *Nelson*, three plaintiffs sued in federal court to recover for personal injuries they sustained in an automobile accident allegedly caused by defendant's negligence. Jurisdiction was invoked on the basis of diversity of citizenship. Although the plaintiffs' complaint apparently had jurisdictionally sufficient claims in its *ad damnum* clause, we looked to the facts averred in support of the complaint and concluded that the trial court had not erred in dismissing the case for lack of subject matter jurisdiction. We agreed that the plaintiffs had failed to allege facts that could conceivably support even a single claim for $10,000. As a result, we concluded that defendants had shown to a "legal certainty" that plaintiffs' claims were insufficient. We therefore affirmed the dismissal for lack of subject matter jurisdiction.

Our holding in *Nelson* is entirely consistent with the rule that, *at a minimum*, plaintiffs must have allegations that are jurisdictionally sufficient. Indeed, in *Nelson*, we held that a jurisdictionally sufficient allegation was not enough—the plaintiff must also allege facts that at some level support a claim that is jurisdictionally sufficient. That is why we affirmed the dismissal in *Nelson*. It bears repeating: plaintiffs concede in their amended complaint that they lack jurisdictionally sufficient claims. We have no

choice but to dismiss the actions or, at least, to require that plaintiffs file complaints which comply with 28 U.S.C.A. § 1332. The majority's conclusion today that dismissal is not required has no basis in any decision of any federal court at any time.

Moreover, even if I were willing to yield to the majority's distortion of the "legal certainty" test, I would conclude that petitioners have met their burden of proving to a legal certainty that plaintiffs claims are jurisdictionally insufficient. First, plaintiffs admit exactly that in the amended complaint. Second, petitioners have introduced unrefuted evidence that as much as 60% of the plaintiff class has a claim for less than the jurisdictional minimum. At oral argument, plaintiffs repeatedly stressed that there were at least 16,000 members of the class who had claims in excess of the jurisdictional minimum. This class contains over 35,000 plaintiffs. It remains the law that, "[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case—'one plaintiff may not ride in on another's coattails.' " *Zahn*, 414 U.S. at 301 (quoting *Zahn v. International Paper Co.*, 469 F.2d 1033, 1035 (2d Cir. 1972)). *See also Snyder*, 394 U.S. 332 (separate claims in a class action suit could not be aggregated for the purpose of meeting the jurisdictional minimum amount in controversy requirement). That leaves over 17,000 claims of plaintiffs for which the court lacks jurisdiction. The majority's conclusion that the defendants have failed to show that the plaintiffs' claims are jurisdictionally insufficient to a "legal certainty" is incredible in light of (1) plaintiffs' admission in their amended complaint and (2) defendants' uncontradicted evidence that 60% of the plaintiff class have damages less than the jurisdictional minimum.

The majority claims that "[p]ostponing dismissal of such plaintiffs not only appears prudent, but it meshes with our policy [of dismissing only those 'flagrant' cases where it

can be determined in advance 'with legal certainty' that the jurisdictional minimum is not satisfied]." Maj. typescript op. at 16 (citation omitted). But, there is no reason in this litigation to relax the rule in *Zahn*, even if we had that power. Indeed, policy considerations, even if they were relevant in jurisdictional matters, suggest that the rule in *Zahn* should be vigorously applied.

In the event that defendants prevail after a trial on the merits, individual plaintiffs could avoid the preclusive effect of an adverse decision with respect to the common questions of law and fact by proving that they never had a claim in excess of $10,000. It is even possible that plaintiffs whose claims do exceed $10,000 could attack an adverse decision collaterally by later alleging that the class was defective because so many members lacked claims for more than $10,000 that the class action should have been dismissed. For all these reasons, I believe that we have a constitutional duty to grant the mandamus relief petitioners have requested.

II.

The district court refused to dismiss the present case although it was discovered that the plaintiff class included plaintiffs who were not diverse from all defendants. The district court ruled that "if one member of a class is of diverse citizenship from the class' opponent, and no non-diverse parties are named parties, federal jurisdiction is proper. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); *see also In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987)." Memorandum and Order at 5-6, filed with Pretrial Order No. 197 in *In re School Asbestos Litig.*, No. 83-0268 (E.D. Pa., filed Nov. 15, 1989). Recently, Justice O'Connor expressed the same view in her dissent in *Carden v. Arkoma Assocs.*, 110 S.Ct. 1015, 1023 (1990) (O'Connor, J., dissenting).

The authority cited by the district court supports its conclusion that complete diversity is not jurisdictionally

required. Notwithstanding Justice O'Connor's dissent in *Carden* (which was not a suit involving class actions), recent decisions of the Supreme Court undermine that conclusion.[9]

In order for an inferior court to have jurisdiction over any matter, it must have both constitutional and statutory authority. *See Finley v. U.S.*, 109 S.Ct. 2003, 2006 (1989) ("It remains rudimentary law that '[a]s regards all courts of the United States inferior to this tribunal, two things

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[9] I dismiss as incorrect the majority's contention that it need not reach defendant's claim of pendent-party jurisdiction because its decision is that diversity jurisdiction exists under section 1332(a) for these class action suits. *See* maj. typescript op. at 12. It is beyond dispute that there is no subject matter jurisdiction in diversity cases where there is incomplete diversity between plaintiffs and defendants. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Since I doubt that the majority would attempt to overrule the Supreme Court on this or any other point, I must construe the majority's statement that the exercise of jurisdiction over non-diverse class action plaintiffs is permissible under section 1332(a) as a statement that the non-diverse class action plaintiffs fall within the court's pendent-party jurisdiction. *See, e.g., Finley v. U.S.*, 109 S.Ct. at 2006 (pendent-party jurisdiction is "jurisdiction over parties not named in any claim that is independently cognizable by the federal court"). In other words, the exercise of jurisdiction over parties where the court otherwise lacks subject matter jurisdiction is pendent-party jurisdiction—to say that a federal court can exercise jurisdiction over non-diverse parties in a Rule 23(b)(3) class action is to say that the federal court has pendent-party jurisdiction over the non-diverse plaintiffs.

As it stands, the majority seems to suggest that there is a special kind of jurisdiction known as class action jurisdiction which amounts to an exception to the rule requiring complete diversity where jurisdiction is based on diversity of citizenship. This suggestion implies that Rule 23 somehow enlarges the jurisdiction of federal courts in diversity cases. "[I]t is axiomatic, [however,] that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). *See also* Fed. R. Civ. P. 82. Again, I can only presume that the majority opinion rests on the conclusion that 28 U.S.C. § 1332(a) contains a statutory grant of power for federal courts to exercise pendent-party jurisdiction.

are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . . To the extent that such action is not taken, the power lies dormant.' " (quoting *The Mayor v. Cooper*, 6 Wall. 274, 252 (1868)).

To determine whether jurisdiction exists in any case, the court must first ascertain whether it has a constitutional grant of power over the subject matter. The Constitution extends the judicial power to "all Cases . . . arising under this Constitution, the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States . . ." U.S. Const. art. III, § 2. The case before us now concerns the power of a federal court to exercise jurisdiction in a diversity suit over parties over whom there is no independent basis for jurisdiction (because of a lack of complete diversity).

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) is the seminal case on the scope of the constitutional grant of jurisdictional power. *Gibbs* concerned the power of a federal court to retain jurisdiction of a state law claim after it dismissed the federal claim on which federal jurisdiction had been based. As such, *Gibbs* is properly classified as a case about pendent-claim jurisdiction (the power of a federal court to hear claims for which there is no independent basis for federal jurisdiction), while the case we have before us is pendent-party jurisdiction (the power of a federal court to hear actions concerning parties for whom there is no independent basis for jurisdiction).

Gibbs set forth a broad reading of the constitutional grant of jurisdictional power.

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority***, U.S. Const., Art. III, § 2, and the re-

> lationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'

Gibbs 383 U.S. at 725 (footnote omitted). The relationship between the state and federal claim permit the conclusion that they comprise one constitutional case when they "derive from a common nucleus of operative fact." *Id.* The test for whether the two claims derive from a "common nucleus of operative fact," is "if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole." *Id.* (footnote omitted).

Although it is by no means an easy question, I am willing to assume that all claims at stake in this class action derive from a common nucleus of operative fact such that there is before us one constitutional case. Accordingly, I agree that we have constitutional power to hear this case. Constitutional power, however, is not enough.

The next step is to determine how much of this constitutional grant of power has been congressionally authorized in 28 U.S.C.A. § 1332(a). *See Finley*, 109 S.Ct. at 2007 ("Our cases show . . . that with respect to the addition of parties, as opposed to the addition of only claims, we will not assume that the full constitutional power has been congressionally authorized, and will not read jurisdictional statutes broadly.") From as early as the Judiciary Act of 1789, in which Congress first authorized federal courts to exercise diversity jurisdiction, the Supreme Court has interpreted the legislative grant of jurisdictional power to hear diversity suits to require "complete diversity" of citizenship. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). *See also Carden*, 110 S.Ct. at 1017 (1990).

Following the doctrine requiring complete diversity, the Supreme Court has refused to read 28 U.S.C.A. § 1332(a) as granting federal courts power to exercise pendent-party jurisdiction in diversity cases. In *Zahn v. International Paper, supra*, the Court refused to allow class action plaintiffs to aggregate their claims to satisfy the jurisdictional minimum amount in controversy, notwithstanding the fact that all the claims together amounted to a single constitutional case under *Gibbs*. *See Finley*, 109 S.Ct. at 2007. Professor Moore has written, based on the reasoning of *Zahn*, "the citizenship of each member of the class must be considered." 1990 *Moore's Federal Practice Rules Pamphlet*, ¶ 23.18 at 253. In *Kroger*, 437 U.S. 365, another diversity case, the Court refused to permit the plaintiff to assert a claim directly against a non-diverse third party, although the Court recognized that the controversy involved one constitutional case under the *Gibbs* test. Thus, the Supreme Court has not read 28 U.S.C.A. § 1332(a) to confer the power on federal courts to exercise jurisdiction over parties for whom there is no independent basis for jurisdiction in diversity cases.

The only time that the Supreme Court has ever exercised anything that even looks like pendent-party jurisdiction in a class action diversity suit was in 1921. In *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), the Court held that unnamed plaintiff members of a class action suit who had lost their suit in federal court were precluded from suing again in state court based on the same underlying claim. The class action plaintiffs argued that they were not bound by the decision in the first case because joinder of them in the first case would have destroyed complete diversity in the federal class action. The Court held that the plaintiffs were barred from suing again because they were properly represented in the first suit. *Id.* at 367.

Ben-Hur has been characterized by the Supreme Court as an example of "ancillary jurisdiction," which the Court

then described as a doctrine "bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger v. Howard*, 427 U.S. 1, 11 (1976). Under the modern class action rules, *Ben-Hur* would be a Rule 23(b)(1) class action, since the dispute involved indivisible claims of class members to a common fund. Accordingly, the reasons for the decision in *Ben-Hur* are not controlling here.

The Supreme Court on two occasions has dealt with the question whether a federal court could exercise pendent-party jurisdiction over parties for whom there was no independent basis for jurisdiction in class action diversity suits. The first was in *Snyder*, 394 U.S. 332. In *Snyder*, the Court stated in *dicta*, "Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State." *Id.* at 340 (citing *Ben-Hur*, 255 U.S. 356). *Snyder* is not, however, controlling on this issue, since the controversy in that case concerned the power of a federal court to exercise pendent-party jurisdiction over class action plaintiffs whose claims were for less than the jurisdictional minimum amount in controversy. In *Snyder*, the Court held that there was no subject matter jurisdiction and dismissed the case. There was no question presented there about the power of the Court to exercise jurisdiction over the claims of non-diverse class action plaintiffs. As a result, although we must respect reasoned *dicta* of the Supreme Court, *see, e.g., Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120, n.8 (7th Cir. 1989), we are not bound to follow the *Snyder* Court's conclusion since that was not the issue addressed. *See also In re Permian Basin Area Rate Cases*, 390 U.S.

747, 775 (1968) ("this Court does not decide important questions of law by cursory dicta inserted in unrelated cases").

The second instance where the Supreme Court mentioned the question whether a federal court could exercise pendent-party jurisdiction over parties for whom there was no independent basis for jurisdiction was in Justice O'Connor's dissent in *Carden*, 110 S.Ct. at 1023. Unlike *Snyder*, *Carden* was not even a case about class actions. The dispute in *Carden* was whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be considered in determining diversity of citizenship among the parties. *Carden*, 110 S.Ct. at 1016. The majority answered in the affirmative, the dissent disagreed. There was no discussion in *Carden* about pendent-party jurisdiction—everyone agreed that there had to be complete diversity between all plaintiffs and all defendants. The inquiry was whether citizenship of the limited partners mattered for the purpose of determining the citizenship of the artificial entity known as the limited partnership. There was no question before the Supreme Court about the need for an independent basis of jurisdiction for every plaintiff in court. The only question was whether partnerships should be treated like corporations for the purpose of determining citizenship. Accordingly, even if the dissent had been the majority opinion in *Carden*, we would not be bound by the statement that only the citizenship of the named plaintiffs matter in Rule 23 class actions. We are, of course, not bound by a dissent to a Supreme Court opinion.

Recently, another Court of Appeals addressed a similar issue to the one before this Court. In *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 161-62 (2d Cir. 1987), the court held that under long-standing Supreme Court doctrine, "complete diversity is required only between the named plaintiffs and the named defendants in a federal class action." *Id.* at 162. While I recognize that *In re Agent Orange* directly supports plaintiffs' jurisdictional theory, I

believe that its vitality has been totally undermined by the Supreme Court's decision in *Finley*.

Finley reminds us that federal courts must have both a constitutional and statutory basis for exercising jurisdiction. While we might assume under *Gibbs* that the district court had the constitutional power to hear the case, the same is by no means true of the statutory power authorized by 28 U.S.C.A. § 1332(a). The question boils down to whether section 1332(a) can be read as containing an authorization by Congress for federal courts to exercise jurisdiction over parties over whom there is no independent basis of jurisdiction, *i.e.*, where complete diversity is lacking. I do not believe it can.

In case after case, the Supreme Court has refused to allow federal courts to exercise pendent-party jurisdiction over parties for whom there was no independent basis for federal jurisdiction in diversity cases. *See, e.g., Kroger; Zahn; Snyder;* and *Strawbridge v. Curtiss.* In light of Supreme Court precedent that has consistently refused to read 28 U.S.C.A. § 1332(a) as containing an authorization for federal courts to exercise pendent-party jurisdiction over parties where complete diversity is lacking, I conclude that the district court must dismiss these cases for lack of subject matter jurisdiction.

III.

These three class actions should have been dismissed by the district court for lack of subject matter jurisdiction. Defendants have introduced unrefuted evidence that as much as 60% of plaintiff class cannot meet the jurisdictional minimum amount in controversy required by 28 U.S.C.A. § 1332(a). Plaintiffs have even conceded this in the complaint. Inasmuch as the Supreme Court has long held that every plaintiff with a distinct claim must meet the jurisdictional minimum requirement even in class action suits, the case should be dismissed. Nor am I per-

suaded by the majority's articulation of a "legal certainty" test that defendants have failed to meet. Even the most stringent (and distorted) version of this test which would waive the requirement that the plaintiff plead facts which support an allegation that the federal court has jurisdiction over the subject matter shows to a "legal certainty" that the majority of plaintiffs represented in this class action have claims for less than the jurisdictional minimum.

In addition to the fact that the district court lacks subject matter jurisdiction because of jurisdictionally insufficient claims, this class action also violates the requirement that there be "complete diversity" between all plaintiffs and all defendants. Because complete diversity is lacking between members of the plaintiff class and named defendants, the case should have been dismissed for lack of subject matter jurisdiction.

I would grant the writ of mandamus defendants have requested.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

FILED

NOV 15 1989

MICHAEL E. KUNZ, Clerk

MEMORANDUM AND ORDER

J. M. KELLY, J. NOVEMBER 14, 1989

Procedural Background

On May 1, 1989, following oral argument, this court entered Pretrial Order No. 191 directing the plaintiffs to file amended pleadings curing the allegational deficiencies brought to the attention of the court by defendants Kaiser Gypsum Company, Inc., United States Gypsum Company and a number of undersigned defendants in various motions to dismiss. On May 30, 1989, the plaintiffs filed amended complaints in this cause of action. On June 13, 1989, certain defendants filed a motion to dismiss and to strike the allegations of class representation from the amended complaints for failure to plead subject matter jurisdiction. On June 16, 1989, defendant Fibreboard Corporation filed a motion to dismiss for lack of subject matter

jurisdiction.[1] The parties have completed the process of filing briefs responsive to the jurisdictional issue before the court.

Discussion

I will address, in turn, the central arguments of the defendants. First, defendants argue that any class action under Fed. R. Civ. P. 23(b)(3) whose jurisdiction is founded upon 28 U.S.C. § 1332(a) cannot include plaintiffs whose claims do not amount to or exceed the sum of ten thousand dollars ($10,000). In *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973), the Court held that district courts are required to dismiss from the class action any specific class member who does not meet the amount in controversy requirement. *Zahn* does not require that the entire class action be dismissed for lack of subject matter jurisdiction over the unnamed members who do not have a claim for $10,000 or more. The applicable standard requires that it appear to a "legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (footnote omitted). Although this court has no affirmative obligation to police the damages claims, by admission of the plaintiffs, the court has cause to inquire as to the sufficiency of the claims of putative class members. *See In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 163 (2d Cir. 1987). In this case, it is uncertain which plaintiffs, if any, should be dismissed. Fed. R. Civ. P. 12(d) permits a district court to defer until trial jurisdictional questions raised by a mo-

[1] Additional defendants have moved separately to dismiss the amended complaints for lack of subject matter jurisdiction. These additional motions incorporate by reference the arguments made in the motions to dismiss discussed above. The moving defendants are: Combustion Engineering, Inc., Pittsburgh Corning Corp., United States Gypsum Co., Wilkin Insulation Co., Asbestos Corp. Ltd., and Bell Asbestos Mines, Ltd.

tion filed under Fed. R. Civ. P. 12(b)(1) (lack of jurisdiction over the subject matter).[2] Kaiser Gypsum Company, Inc.'s motion is a Rule 12(b)(1) motion; however, the motion of undersigned defendants is filed pursuant to Rule 12(h)(3). According to Federal Rule of Civil Procedure 12(h)(3):

> a question of subject matter jurisdiction may be presented by any interested party at any time, either by motion or in the answer. Furthermore, it may be interposed as a motion for relief from a final judgment under Rule 60(b)(4) or presented for the first time on appeal. As was stated by the court in *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 169 F.Supp. 774 (D.C. Cal. 1958), *reversed on other grounds*, 362 U.S. 73 (1960): If Federal jurisdiction is not apparent, the Court not only will, but must, refuse to proceed with the determination of the merits of the controversy, *unless this failure can be cured.*"

Wright & Miller, Federal Practice and Procedure § 1393 (footnotes and quotations omitted) (citation and emphasis added).

Any potential jurisdictional problems raised in this case can be cured at trial by entering final judgment at the damages stage of the trial only against those plaintiffs that have sustained the burden of proving damages in excess of $10,000. Caselaw supports postponement.

In *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988), defendant Velsicol filed two separate Rule 12(b)(1) motions prior to trial arguing that the district court lacked subject

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[2] Fed. R. Civ. P. 12(d) states in relevant part:

> The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading of by motion . . . shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

matter jurisdiction because certain representative plaintiffs and putative class members did not allege that the amount in controversy between each of them and the defendants exceeded $10,000. Velsicol further argued that the district court was required to immediately consider the sufficiency of each plaintiff's claim and dismiss all of those plaintiffs unable to demonstrate a valid claim at that time. The district court deferred the jurisdictional decision with regard to the representative class members until the trial and until the second phase of the trial with regard to the absent class members. The Court of Appeals for the Sixth Circuit affirmed the district court's deferring resolution of the jurisdictional question raised by the defendants' motions. The district court stated:

> [It] also seems to me that it is not necessary at this point for the court to wholesale order a dismissal of all those potential class members who may not at this point have pleaded, because it seems to me that that's a matter that might well come up at some point down the road after the initial phase of the case is tried. . . . [W]hen you get down to establishing amounts in a case such as this, where there is a jury trial, it puts a burden on the court that the court really doesn't want to undertake, and that is an assessment of claims at this point to try and make a determination of whether a jurisdictional amount, in fact, can be asserted at this point. . . .

855 F.2d 1188, 1195 n. 5 (6th Cir. 1988).

Defendants refer to the United States Environmental Protection Agency (EPA) Report,[3] as support for the proposition that approximately sixty percent (60%) of the class member school districts do *not* have a claim in excess of the jurisdictional amount requirements. In other words, the

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[3] EPA, *Evaluation of the Asbestos-in-Schools Identification and Notification Rule*, October, 1984 at XI.

defendants argue that the EPA reported that only 40% of the nation's public school districts and private schools had friable asbestos-containing materials in one or more of their buildings. Plaintiffs respond that the EPA Report does not reflect the fact that, over time, the asbestos that is now known to exist in a percentage of the school buildings, but which is not yet friable, will inevitably become friable. Assuming for the sake of argument that defendants' position is correct, that only 40% of the plaintiff school districts have a claim, the identify of those plaintiffs is still unknown. As discussed above, the best solution is to await trial for the determination of which specific school districts must be dismissed.

Defendants argue that each member of the class must be of diverse citizenship from each defendant in the case. This argument is contrary to law. Long-established Supreme Court precedent establishes that if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse parties are named parties, federal jurisdiction is proper. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969); see also In re Agent Orange Products Liability Litigation, 818 F.2d 145, 162 (2d Cir. 1987).

Defendants argue that this court's subject matter jurisdiction is limited by the "local action" doctrine to claims related to property located in Pennsylvania because the doctrine applies to any action directly affecting land and real property. The two main cases cited by defendants, *Dayton Independent School District v. U.S. Mineral Products Co.*, 1987 U.S. Dist. Lexis 6749, (E.D. Tex. 1987) and *Prudential Insurance Co. v. United States Gypsum Co.*, (D.N.J. 1989) (87-4227), involved various products liability and tort claims related to asbestos-containing materials found in buildings. The *Prudential* court assumed, without deciding, that the issue raised was a jurisdictional question;[4] both cases held that the claims were more appro-

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[4] The local action doctrine has been described both as an issue of

priately characterized as "transitory" and not "local" in nature because the remedy sought was monetary damages and not recovery of possession of title to real property.

Defendants distinguish *Dayton* and *Prudential* from the case before us by point out that questions as to title are present in our case. Defendants suggest that questions regarding the ownership of some of the school buildings in question have been raised since the litigation commenced. For example, defendants suggest that over the years, various school buildings have been sold and the new owners have not been included on the class notice mailing lists.

In the amended complaints, the plaintiffs allege claims of negligence, strict liability, breach of warranties, concert of action, civil conspiracy, intentional tort, restitution and malicious, reckless misconduct. These largely tort claims are, as described above, considered "transitory" in nature. The relief sought in the amended complaints is for monetary damages. Therefore, the local action doctrine does not apply. It is possible that questions related to ownership of some particular buildings may arise later in the litigation. Those particular school districts could be dismissed for lack of subject matter jurisdiction at that point if indeed the local action doctrine is shown to apply. It is premature for the Court to dismiss the amended complaints for lack of subject matter jurisdiction on the basis of the "local action" doctrine as the amended complaints allege claims not bound to any issues of title or possession of real property.

An appropriate order follows.

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subject matter jurisdiction and a question of venue. *Compare Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 290-91 (5th Cir. 1987) (question of subject matter jurisdiction) *with Ralph J. Musicus, Inc. v. Safeway Stores, Inc.*, 743 F.2d 503, 506 (7th Cir. 1984) (question of venue).

APPENDIX G

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

January 9, 1991

No. 90-1247

Re: In Re: School Asbestos Litigation

School Dist. Lancaster et al vs. Lake Asbestos Quebec et al.
Kaiser Cement Corporation, Appellant

Dear Counsel:

Enclosed herewith is conformed copy of Order filed today in the above-entitled case.

Very truly yours,

Sally Mrvos, Clerk

By /s/

M. Elizabeth Ferguson
Chief Deputy Clerk
Direct Dial 597-8465

bj
enc
cc: D.J.Ryan,Jr.Esq.
F.B.Lacey,Esq.
E.W.Madeira Jr.Esq.
D.Berger,Esq.
A.Levin,Esq.
H.B.Newberg,Esq.
M.L.Hardy,Esq.

S.H.Newberger,Esq.
M.S.Boast,Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1247

IN RE: SCHOOL ASBESTOS LITIGATION

SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
and NORTHEASTERN SCHOOL DISTRICT

v.

LAKE ASBESTOS OF QUEBEC, LTD.,
THE CELOTEX CORPORATION, RAYMARK INDUSTRIES,
INC.,
UNION CARBIDE CORP., ASBESTOSPRAY CORP.,
SPRAYO-FLAKE COMPANY, NATIONAL GYPSUM CO.,
SPRAYED INSULATION, INC., ASBESTOS FIBRES INC.,
DANA CORPORATION, U.S. GYPSUM,
U.S. MINERAL PRODUCTS COMPANY,
SPRAYON INSULATION & ACOUSTICS, INC.,
SPRAYON RESEARCH CORP., KEENE CORP., WORBEN CO.,
INC.,
WILKIN INSULATION COMPANY, W.R. GRACE & CO.,
OWENS-CORNING FIBERGLAS CORPORATION,
STANDARD INSULATION, INC.,
NORTH AMERICAN ASBESTOS CORPORATION,
CASSIAR RESOURCES LTD., BELL ASBESTOS MINES,
LTD.,
ASBESTOS CORPORATION LIMITED, SOUTHERN TEXTILE
CORP.,
OWENS-ILLINOIS, INC., TURNER & NEWALL LIMITED,
THE FLINTKOTE CO., FIBREBOARD CORPORATION,
GAF CORP., UNIROYAL, INC., CAPE ASBESTOS,
PFIZER, INC., KAISER CEMENT CORPORATION,
BES-TEX, INC., GEORGIA-PACIFIC CORP.

Kaiser Cement Corporation,
Appellant

(D.C. Civ. No. 83-00268)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, *Chief Judge,*
SLOVITER, BECKER, STAPLETON,
MANSMANN, GREENBERG, HUTCHINSON, SCIRICA,
COWEN,
NYGAARD, ALITO and ALDISERT*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied. Judge Hutchinson would grant rehearing by the court in banc. Judge Cowen would grant rehearing by the court in banc for the reasons set forth in his dissent.

BY THE COURT,

/s/

Circuit Judge

Dated: Jan. 9 1991

* As to panel rehearing only.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MASTER FILE NO. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

NOTICE OF CLASS ACTION LITIGATION RELATING TO SCHOOL ASBESTOS CLAIMS

This Notice is being sent to you pursuant to an Order of the United States District Court for the Eastern District of Pennsylvania and Rule 23(c)(2) of the Federal Rules of Civil Procedure. The purpose of this Notice is to inform you of the pendency of a class action in which you are a member of a class. You are being informed of these matters so that you may make appropriate decisions as to what steps you may wish to take in relation to this litigation.

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. OTHER THAN THE NOTICE OF A PROPOSED PARTIAL SETTLEMENT WITH TWO DEFENDANTS IN THIS LITIGATION, OWENS-ILLINOIS, INC. AND PROKO INDUSTRIES, INC., THIS IS THE FIRST COURT NOTICE YOU HAVE RECEIVED OF THIS ACTION, REGARDLESS OF WHAT OTHER NOTICES YOU MAY HAVE RECEIVED IN THE PAST CONCERNING THE PRESENCE OF ASBESTOS IN SCHOOL BUILDINGS OR ANY OTHER LEGAL PROCEEDING. FURTHER, THIS NOTICE IS NOT TO BE CONFUSED WITH THE FORM OF PROOF OF CLAIM FOR PROPERTY DAMAGE CLAIMANTS WHICH MAY HAVE BEEN SENT TO YOU BY ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN THE MANVILLE CORPORATION BANK

RUPTCY. THE MANVILLE CORPORATION IS NOT A DEFENDANT IN THIS CLASS ACTION. PRESENTLY, ALL PROCEEDINGS REGARDING MANVILLE ARE BEING HANDLED BY THE BANKRUPTCY COURT.

1. There are now pending in the United States District Court for the Eastern District of Pennsylvania claims brought by the following school districts: The School District of Lancaster (Pennsylvania), the Manheim Township School District (Pennsylvania), the Lampeter-Strasburg School District (Pennsylvania), the Barnwell School District No. 45 (South Carolina), the Board of Education of the Memphis City Schools (Tennessee), and the Napa Valley Unified School District (California). These plaintiffs have brought suit on behalf of themselves, all public and non-profit private, elementary and secondary schools and school districts throughout the United States.

The complaints allege that friable asbestos-containing products have been used in school buildings. The complaints seek compensatory damages, punitive damages, and equitable relief, and allege that the defendants should bear the cost of identification, analysis, repair, removal, and replacement of the products. Plaintiffs' theories of liability include negligence, strict liability in tort, breach of warranty, intentional tort, concert of action, and civil conspiracy.

2. The defendants are as follows:

ACandS, Inc.
Armstrong World Industries, Inc.
Asbestospray Corp.
Asbestos Corporation Limited
Asbestos Fibres, Inc.
Asten Group, Inc.
Basic, Inc.
Bell Asbestos Mines, Ltd.
Benjamin Foster Co., Division of Amchem Products
Bes-Tex, Inc.
Brinco Mining Ltd., formerly known as Cassiar Resources Ltd.
C. Tennant & Sons
Cape Asbestos
Carey-Canada, Inc.
Combustion Engineering, Inc.
Dana Corp.
Eagle-Pitcher Industries, Inc.
Empire Ace Insulation Manufacturing Corp.
Fibreboard Corporation
GAF Corp.
Georgia-Pacific Corp.
H.K. Porter Co.
J.W. Roberts, Ltd.
Kaiser Gypsum Co., Inc.
Kaiser Cement Corporation
Keene Corp.
Lac D'Amiante Du Quebec, Ltee.
National Gypsum Company
Owens-Corning Fiberglas Corporation
Pfizer, Inc.
Pittsburgh Corning Corp.
Raymark Industries, Inc.
Rock Wool Manufacturing Co., Inc.
Sprayed Insulation, Inc.
Sprayo-Flake Company
Sprayon Insulation & Acoustics, Inc.
Sprayon Research Corp.
Southern Textile Corp.
The Celotex Corporation
The Flintkote Company
Turner Asbestos Fibres, Ltd.
Turner & Newall Limited
Union Carbide Corp.
Uniroyal, Inc.
United States Gypsum Company
U.S. Mineral Products Co.
W.R. Grace & Co.
Wilkin Insulation Co.
Worben Co., Inc.

The defendants deny that they are liable for any claim asserted by plaintiffs and they intend to pursue numerous affirmative defenses to plaintiffs' claims.

3. The court has not passed upon any of the contentions of the parties. The sending of this Notice is not to be construed as an expression of any opinion by the court about merits of any claims or defenses. The foregoing is only a summary of the contentions of plaintiffs and defendants. The pleadings and other records of this litigation more fully reflect the respective contentions of the parties. You or your counsel may review the pleadings and other papers filed at the Office of the Clerk, United States District Court, 601 Market Street (2nd Floor), Philadelphia, Pennsylvania.

4. On September 28, 1984, this court certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff class consists of all elementary and secondary public school districts and non-profit private schools in the United States, more particularly defined as follows:

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public elementary or secondary educational facilities, including entities with religious affiliations, in the United States, to the extent hat such non-profit entities are owned or operated by one or ore non-profit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual

This class certification does not imply a conclusion that any entity within the class was injured as a result of the presence of friable asbestos-containing products in its buildings. This class applies to all claims for compensatory damages and equitable relief and participation in the class

is voluntary. You are automatically a member of the class unless you exclude yourself, as more fully described in paragraph 7.

WHAT YOU MUST DO TO PROTECT YOUR RIGHTS:

5. If you fall within the definition of the class as set forth above, you are automatically a member of the class. The court has determined that the class will be further defined to include the following three subclasses: (1) class members with asbestos-containing ceiling plaster and or fireproofing on structural members, (2) class members with asbestos-containing pipe and boiler insulation, and (3) class members who have other property (not specified in (1) or (2) above) containing asbestos. A given class member may have only ceiling fireproofing material, only pipe and boiler insulation, other asbestos-containing products, or any combination thereof in its buildings.

If you wish to exclude yourself from the class, for whatever reasons, you may elect to do so and you may opt out.

6. If you exclude yourself from the class, you will not be bound by any determination in the class. You will be free to initiate your own independent law suit, but you will not share in any recovery on behalf of the class or any other benefit that may result from the class action litigation.

7. You may exclude yourself from the class only if you request exclusion in writing by signing and mailing the enclosed Exclusion Request to the Clerk, United States District Court for the Eastern District of Pennsylvania, P.O. Box 2179, Philadelphia, PA 19103, no later than midnight, December 1, 1987. The filing of a law suit in your own behalf does not constitute a request for exclusion from the class. Failure to mail such request may preclude you from later being excluded if you so desire.

8. If you do not exclude yourself by December 1, 1987 from the class, you will be bound by any class judgment, whether or not favorable and you may, but need not, enter an appearance in this action through counsel or your choosing. If you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel. Otherwise, the named plaintiff school districts and their counsel will represent your interests as a member of the class. Class members will not have to personally pay any of the attorneys' fees or cost of counsel whose services benefit this class litigation. To the extent that any monetary recovery is ultimately obtained on behalf of the class, your share of any recovery will be assessed, along with all others, on a pro rata or other fair and equitable basis prior to distribution, for the costs and expenses of this action, including such counsel fees as may be awarded by the court. A list of class counsel is available from the Clerk of Court at the address listed on the Notice of Exclusion.

9. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

10. At the time of the filing of the complaints in these cases, plaintiffs could not sue Johns-Manville Corporation, its parent Manville Corporation, and certain of their affiliates (collectively "Manville"), Amatex Corp., or Unarco Industries, Inc., because these companies had filed petitions in various United States Bankruptcy Courts. Therefore, four companies that were named in this action, Forty-Eight Insulations, Inc., Standard Insulations, Inc., Huxley Development Corporation and Nicolet, Inc., also filed petitions in United States Bankruptcy Courts. Pursuant to orders of these United States Bankruptcy Courts, the plaintiffs may not sue these companies n this class action proceeding. Since these companies are not defendants in the litigation which is the subject of this Notice, the class

action certification described herein does not apply to these companies.

11. In the Manville bankruptcy proceeding, the Bankruptcy Court ordered that in order to preserve any claim which you may have against Manville for the cost of testing or asbestos abatement action, a separate claim had to be filed on the form provided by Manville in the Manville bankruptcy proceeding in the Southern District of New York. Any action taken by you in the Bankruptcy Court will not affect your rights in this class action. Rather, if you wish to remain a member of the class in the national class action proceeding which has been filed in the United States District Court for the Eastern District of Pennsylvania, you need do nothing at this stage of the proceeding.

12. Requests for changes of address, and inquiries regarding this Notice should be sent to:

Clerk, United States District Court for
– the Eastern District of Pennsylvania
(In re: Asbestos School Litigation,
Master File No. 83-0268)
P.O. Box 2179
601 Market Street - Room 2609
Philadelphia, PA 19103

MICHAEL E. KUNZ
Clerk of Court
U.S. District Court for the
Eastern District of Pennsylvania

Dated: September 21, 1987

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Master File No. 83-0268

IN RE: ASBESTOS SCHOOL LITIGATION
THIS DOCUMENT RELATES TO ALL ACTIONS

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION WITH LAC D'AMIANTE DU QUEBEC, LTEE AND SETTLEMENT HEARING

TO: ALL MEMBERS OF THE CLASS IN THE ABOVE CAPTIONED LITIGATION

The purpose of this notice is to advise you:

1. Of the pendency of a settlement of this class action with Lac d'Amiante du Quebec, Ltee (LAQ") in the amount of $1,000,000.

2. Of a settlement hearing to approve this settlement to be held on February 12, 1990.

PLEASE READ THIS NOTICE CAREFULLY. YOUR RIGHTS MAY BE AFFECTED BY LEGAL PROCEEDINGS IN THIS LITIGATION.

I. Settlement Hearing

1. Pursuant to an order of the United States District Court for the Eastern District of Pennsylvania (the "Court") dated November 22, 1989 a hearing well be held in Court Room 8A of the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania at 9:30 A.M. on February 12, 1990 to determine whether the proposed settlement with LAQ as set forth in the Settlement Agreement dated March 31, 1989 is fair, reasonable, and

adequate and should be approved by the Court and whether LAQ should be dismissed from the class action pursuant to this settlement.

2. This notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure. This notice is not an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by any party in this litigation. The purpose of this notice is to inform you of the pendency of a proposed settlement with LAQ and of the nights you have with respect to the proposed settlement.

3. Class plaintiffs' counsel recommends Court approval of the proposed settlement with LAQ as fair and reasonable and in the best interest of the members of the class in view of (1) the risks and costs of continuing the litigation as against LAQ, (2) the substantial valuable benefits which will accrue under the terms of the proposed settlement to the class, (3) the favorable total sum of this settlement compared to potential large recoveries from the remaining nonsettling defendants in the litigation, and (4) the favorable total sum of this settlement compared to the potential recovery from LAQ in the litigation.

4. At the Settlement Hearing, any member of the class (as defined in paragraph 7, hereof) may appear in person or through counsel and be heard to the extent allowed by the Court in support of, or in opposition to, the fairness, reasonableness and adequacy of the proposed settlement with LAQ. However, no party will be heard in opposition to the proposed settlement and no papers or briefs submitted by any such party will be accepted or considered by the Court unless on or before January 29, 1990 such person (a) files with the Clerk of the United States District Court for the Eastern District of Pennsylvania, United States District Court House, 601 Market Street, Philadelphia, Pennsylvania notice of its intention to appear together with a statement that indicates a basis for such

opposition (b) serves copies thereof and copies of any other papers or briefs it files with the Court, in person or by mail upon each of the following attorneys:

Co-Lead Counsel for Plaintiffs and the Class

David Berger, Esq.
David Berger Attorneys At Law
1622 Locust St.
Philadelphia, PA 19103

Herbert B. Newberg, Esq.
Herbert B. Newberg, Esq., P.C.
227 S. 6th Street, Suite 200
Philadelphia, PA 19106

Counsel for Defendant Lac d'Amiante du Quebec, Ltee.

Frederick B. Lacey, Esq.
LeBoeuf, Lamb, Leiby
& MacRae
520 Madison Ave.
New York, NY 10022

Edward J. Madeira, Jr., Esq.
Pepper, Hamilton & Scheetz
3000 Two Logan Sq.
18th & Arch
Philadelphia, PA 19103

Any member of the class who does not make and serve written objections in the manner provided above shall be deemed to have waived such objections and shall be forever foreclosed from making any objections (by appeal or otherwise) to the proposed settlement. Any member of the class who is satisfied with the proposed settlement with LAQ need not appear at the hearing. Any member of the class who has filed objections to the settlement may, but need not appear at the hearing.

II. Description Of The Litigation

5. Beginning in the calendar year 1983, three class action complaints by various school districts were filed in the Eastern District of Pennsylvania against more than 50 defendants. These complaints have been consolidated into a single action known as "In Re: Asbestos School Litigation, Master File No. 83-0268 (Eastern District of Pennsylvania)". The complaints and the consolidated complaints seek compensatory and punitive damages as well as injunctive relief and allege that defendants should bear the cost of identification, analysis repay removal and replace-

ment of asbestos-containing products used in school buildings. Plaintiffs' theories of liability include theories of negligence, strict liability in tort, intentional tort, breach of warranty, concert of action, and civil conspiracy.

6. LAQ has denied and continues to deny all allegations of wrongdoing, violations of law, or breaches of duty and has asserted and continues to assert (1) that the claims alleged in the litigation have no substance in fact, or law, (2) that it has meritorious defenses to such claims, (3) that it has affirmative defenses that bar such claims, and (4) that LAQ should be dismissed from the litigation.

7. Subsequently, the Court entered Pretrial Order No. 20 dated September 28, 1984 certifying a class pursuant to Federal Rules of Civil Procedure 23(b)(3) consisting of

> All entities which own or operate in whole or in part any public educational facilities, as defined in Section 198(a)(1) of the Elementary and Secondary Education Act of 1965, 20 U.S.C. Section 2854, throughout the United States; and all entities which own or operate in whole or in part any non-public, non-profit elementary or secondary educational facilities, including entities with religious affiliations in the United States, to the extent that such non-profit entities are owned or operated by one or more non-profit corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

The United States Court of Appeals for the Third Circuit on May 1, 1986 upheld the class set forth in the paragraph above and the United States Supreme Court on October 6, 1986 denied defendants' petition for writ of

certiorari seeking review of the Third Circuit's decision affirming a class.

8. The named plaintiffs and their counsel in the course of this litigation have conducted discovery and investigations into the facts of these cases, have made a thorough study of the legal principles applicable to the claims in the litigation and have concluded that a settlement with LAQ in the amount and on the terms hereinafter set forth is fair, reasonable and adequate and is in the best interest of the class.

9. LAQ has agreed to enter into a settlement agreement to avoid further expense, inconvenience and the distraction of expensive, burdensome and protracted litigation, and to obtain total and final peace, satisfaction and protection from the class's claims. The proposed settlement and this notice are not to be construed as admissions of liability of any kind whatsoever by LAQ.

III. Summary Of The Settlement And Release

10. LAQ has created a settlement fund in the amount of $1,000,000, exclusive of interest, for the class described in paragraph 7 above.

11. The fund established pursuant to the proposed settlement is being maintained in full on an interest bearing basis, subject only to such deductions or expenditures as are expressly provided in the agreement and approved or otherwise ordered by the Court. The fund with accrued interest is to be distributed to class members or otherwise as the Court may direct upon final judicial approval of the proposed settlement, or at the conclusion of this litigation, or is to be returned to LAQ in the event that this proposed settlement fails to obtain final judicial approval or is not fully consummated and effected. Notice is expressly given that subject to approval of the Court, the fund may be disbursed in part to defray the cost of the litigation, in-

cluding such reasonable attorneys fees as may be awarded by the Court.

12. Subject to Court approval, the plaintiffs and Co-Lead Counsel and the class shall be reimbursed and idemnified out of the fund for all expenses and costs related to this notice and incurred in the administration of the fund.

13. Except with respect to the expense of notice or as otherwise expressly permitted by provisions of the settlement agreement and by the Court, or otherwise ordered by the Court, no distribution of the fund is to be made until there has been a final judicial approval of the proposed settlement pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, a final judgment has been entered dismissing the claims of all plaintiffs and all members of the class against LAQ and an Order of the Court allowing such distribution has been entered.

14. UPON THE ENTRY OF FINAL JUDICIAL APPROVAL OF THE PROPOSED SETTLEMENT, EACH MEMBER OF THE CLASS SHALL BE DEEMED TO HAVE CONSTRUCTIVELY RELEASED ALL CLAIMS AGAINST LAQ AS IF IT HAD INDIVIDUALLY EXECUTED A RELEASE AND COVENANT NOT TO SUE IN THE FORM OF EXHIBIT "A" ATTACHED HERETO AND INCORPORATED HEREIN.

15. Under the terms of the proposed settlement, the class shall reduce any judgment it obtains against any defendant by the amount percentage or share of such judgment attributable to LAQ so as to bar, discharge and release under applicable law any claims for contribution or indemnity against LAQ arising from or related to the claims. In the event that the class obtains a judgment (including pursuant to a settlement agreement) against one or more defendants in the Litigation and any of those defendants obtains a judgment over, in whole or in part, against LAQ for contribution or indemnity, then the class will be required to reduce or remit any judgment or por-

tions thereof obtained from those defendants by the amount of the judgment over against LAQ.

IV. Reserved Rights of Settling Defendants And Of Class Members

16. THE CLASS EXPRESSLY RESERVES ALL ITS RIGHTS AND CLAIMS AGAINST ALL NONSETTLING DEFENDANTS. THE SETTLEMENT AGREEMENT AND ANY COVENANT WHICH IS EXECUTED PURSUANT THERETO IS *NOT* INTENDED AND IS *NOT* TO BE CONSTRUED AS A RELEASE OR DISMISSAL BY THE CLASS OF ANY CLAIMS OR RIGHTS AGAINST ANY NONSETTLING DEFENDANTS.

V. Examination of Papers

17. The summary of certain provisions of the settlement agreement and of the proposed settlement embodied thereof is not intended, and should not be construed, as a complete statement of the agreement or of the litigation. For a more detailed statement of the matters involved in the litigation, including the terms of the agreement, you are referred to papers on file under the caption *In re: Asbestos School Litigation*, Master File No. 83-0268 which may be inspected during regular business hours at the office of the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Philadelphia, Pennsylvania 19106.

If you have any questions about this notice please write to one of the class counsel identified in paragraph 4. PLEASE DO NOT DIRECT QUESTIONS TO THE COURT OR THE CLERK'S OFFICE.

VI.
Provisions for Attorneys' Fees and Expenses

18. Upon the Court's approval of the proposed settlement, counsel for class plaintiffs may apply to the Court

for an award of attorneys fees and expenses incurred in the prosecution of the litigation to be drawn from the settlement fund. Class plaintiffs may also apply to the Court for use of some or all of such an award to cover the cost of class plaintiffs proceeding with the litigation as against all of the other defendants who have not settled. In any event, any awards and the use to be made of such awards will be determined by the Court upon application of the class plaintiffs'.

MICHAEL E. KUNZ
Clerk Of Court
United States District Court
For The Eastern District
Of Pennsylvania

EXHIBIT A
GENERAL RELEASE AND COVENANT NOT TO SUE

KNOW ALL MEN BY THESE PRESENTS, that Named Plaintiffs in the Litigation *In re: Asbestos School Litigation*, No. 83-0268 (E.D. Pa. filed July 27, 1983) (the "Litigation"), the School District of Lancaster, the Manheim School District, the Lampeter-Strasburg School District, the Barnwell School District No. 45, the Board of Education of the Memphis City Schools and the Napa Valley Unified School District ("Named Plaintiffs") and all members, individually and collectively, of the Rule 23(b)(3) class certified in Order No. 20 (entered September 28, 1984) that have not filed timely and valid exclusion elections (the "Class"), individually and collectively, on behalf of themselves and their predecessors, successors and assigns, intending to be legally bound hereby, for good and valuable consideration, the receipt of which is hereby acknowledged, do hereby absolutely, fully and forever release, relieve, remise and discharge Lac d'Amiante du Quebec, Ltee, its predecessors (including Lake Asbestos of

Quebec, Ltd.) and successors, and past and present assigns, representatives, subsidiaries, divisions, affiliates, parents (and subsidiaries thereof), partnerships and partners, and all of their officers, directors, agents, employees, and attorneys, both past and present ("LAQ"), of and from any and all manner of claims, demands, rights or causes of action (including all claims for punitive damages, costs, expenses or fees), present or future, known or unknown, which the Named Plaintiffs and Class, individually and collectively, had, now had, or hereinafter can, shall, or may have against LAQ from the beginning of the world in connection with, arising out of, based in whole or in part on, or in any way related to facts, matters, acts of commission or omission, statements, agreements or occurrences which were or could have been alleged, described, embraced or otherwise referred to in any of the complaints and amended complaints ("Claims") in all the individual and class actions known as *In re: Asbestos School Litigation* filed in the United States District Court for the Eastern District of Pennsylvania and assigned the Master File No. 83-0268 (E.D. Pa.), including, but not limited to the actions filed by the Named Plaintiffs against, *inter alia*, Lac d'Amiante du Quebec, Ltee (formerly known as Lake Asbestos of Quebec, Ltd.).

Named Plaintiffs and the Class hereby certify that they have made this compromised settlement and executed this Release with the understanding that they are giving up every right that they now have, ever had or may ever have against LAQ, by reason of the injuries, property damages and monetary damages allegedly sustained now or in the future as a result of the presence of asbestos and asbestos-containing products in their buildings.

Named Plaintiffs and the Class covenant and agree not to institute, maintain, collect or proceed against LAQ on any Claims that arise out of, relate to or are based upon, in whole or in part, any subject or matter covered by the release describing in the paragraph above.

Named Plaintiffs and the Class accept and assume the risk that if any fact or circumstance is found, suspected, or claimed hereafter to be other than or different from the facts or circumstances now believed to be true, the general release and covenant not to sue contained herein shall be and remain effective notwithstanding any such difference in any such facts or circumstances.

IN WITNESS WHEREOF, Named Plaintiffs and the Class have caused the undersigned, who are authorized to execute this General Release and Covenant Not to Sue on their behalf, to set forth their hand and seal on behalf of the Named Plaintiffs and Class.

HERBERT B. NEWBERG DAVID BERGER

Co-Lead Counsel for Plaintiffs and the Class

Dated: December 28, 1989

(3) (2) (2)

Nos. 90-1367, 90-1368, 90-1378

Supreme Court, U.S.
FILED
MAR 29 1991
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1990

KAISER CEMENT CORPORATION,
Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

W.R. GRACE & CO., et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

v.

BARNWELL SCHOOL DISTRICT NO. 45, et al.,
Respondents,

and

The Honorable James McGirr Kelly,
Nominal Respondent.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Herbert B. Newberg*
Harvey S. Kronfeld
Sandra L. Duggan
Roger P. Cameron
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Dated: March 29, 1991

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CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUMMARY OF ARGUMENT

This Brief is a consolidated response to three separate petitions for writs of certiorari (Nos. 90-1367, 90-1368 and 90-1378) to review decisions of the Third Circuit on issues of class certification. This class action is a part of the multitude of litigation arising out of asbestos, an unparalleled situation in American tort law and an unprecedented challenge to traditional methods of judicial administration.

This action was commenced more than eight years ago, seeking to recover for property damage resulting from the use of asbestos in school districts throughout the country. In 1984 the district court certified a class action pursuant to Civil Rule 23(b)(3) and, on an appeal allowed under 28 U.S.C. § 1292(b), that part of the district court's order was affirmed by the Third Circuit in 1986.[1] As Judge Weis wrote then,

> our reluctance to vacate the (b)(3) certification is influenced by the highly unusual nature of asbestos litigation. The district court has demonstrated a willingness to attempt to cope with an unprecedented situation in a somewhat novel fashion, and we do not wish to foreclose an approach that might offer some possibility of improvement over the methods employed to date.

789 F.2d at 1011. This Court denied two separate petitions for writs of certiorari seeking to set aside that decision.[2]

In the five years since then much progress has been made. Discovery has revealed the facts and significantly narrowed the issues. Settlements totaling in excess of $40 million have been reached between the class and six of the defendants. The district court is ready to begin trial this Summer or early Fall, 1991.

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1. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986).

2. *Celotex Corp. v. School District of Lancaster*, 479 U.S. 852 (1986); *National Gypsum Co. v. School District of Lancaster*, 479 U.S. 915 (1986).

Some defendants, having previously tried unsuccessfully to prevent this case from going forward as a class action, have now attempted once more to thwart the efforts of the district court to cope with the unprecedented situation this case presents. The Third Circuit has rebuffed their attempts to use the extraordinary writs of mandamus and prohibition to reargue the propriety of class treatment of this action.[3] Now they come yet again to this Court and ask it to put an end to the fruitful and imaginative efforts of the district court.[4]

W.R. Grace petitioners, **No. 90-1368**, seek certiorari to review both the trial court's discretionary, interlocutory ruling denying their motion for class decertification in this school asbestos property damage class action and the Third Circuit's mandamus denial. These petitioners previously had full interlocutory review under 28 U.S.C. § 1292(b) of the initial class certification ruling.[5] After denial of their subsequent motion for class decertification,[6] petitioners sought a second immediate review of the class status of this action through a writ of mandamus, without ever having requested certification for interlocutory review under § 1292(b). After hearing below, the mandamus petition was dismissed by the court of appeals.[7] W.R. Grace petitioners have offered no reason why this class ruling is special or important for this Court to review by certiorari, nor have they demonstrated any circumstances why they are clearly and indisputably entitled to invoke this extraordinary relief. This petition for certiorari is facially without merit both in fact and in law.

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3. *In re School Asbestos Litigation*, 921 F.2d 1310, 1330, 1338 (3d Cir. 1990)(3 cases) (U.S. Gypsum App. at 1a, 45a and Grace App. at 3a, respectively).

4. This case exemplifies the beneficial use of class actions in asbestos litigation as recommended in the REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION TO THE CHIEF JUSTICE OF THE UNITED STATES (Mar. 12, 1991).

5. *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 915 (1986)(2 cases).

6. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 203 (E.D. Pa. Jan. 12, 1990)(Grace App. at 17a).

7. *In re School Asbestos Litigation*, 921 F.2d 1338 (3d Cir. 1990)(Grace App. at 3a).

U.S. Gypsum petitioners, **No. 90-1378**, seek a writ of certiorari on the grounds (1) that the district court allegedly lacks jurisdiction to hear this class action because when first certified, some of the 35,000 absent members, not now identifiable, did not and might not be able to allege the jurisdictional amount requirement, and (2) that there is an alleged novel issue presented regarding diversity of citizenship jurisdiction in a class action. Petitioners' mandamus writ was denied by the court of appeals.[8]

All prerequisites of class action Civil Rule 23(a) have been satisfied here, including the numerosity test. It never has been disputed that the district court has diversity jurisdiction to hear the claims of the named plaintiffs and of a sufficiently large number of the absent-class-member school districts within its jurisdiction[9] to permit the class action to be maintained. Moreover, as a result of the district court's December 17, 1990 order[10] (four days after the court of appeals' decisions) which limited the class, the class now includes "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material"[11] (which, when dry, may be crumbled, pulverized, or reduced to powder by hand pressure, or which otherwise is easily damaged), and who have damages over $10,000.[12] Defendants have not con-

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8. *In re School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990)(U.S. Gypsum App. at 1a).

9. *I.e.*, those schools who have alleged in the Amended Complaint claims for damages in excess of $10,000 arising from friable asbestos-containing products in their school buildings.

10. *In re Asbestos School Litigation*, Master File No. 83-0268, Pretrial Order No. 273 and Memorandum (E.D. Pa. Dec. 17, 1990), 1990 WL 210916 (App. 1a).

11. *In re Asbestos School Litigation*, Master File No. 83-0268, Memorandum accompanying Pretrial Order No. 273 at 1 (E.D. Pa. Dec. 17, 1990)(App. A-2).

12. Allegations in the Amended Complaint in force before December 17, 1990 stated that the class consisted of, among others, members whose buildings have or had friable asbestos-containing materials and who incurred damages more than $10,000. U.S. Gypsum App. at 82a, 91a. The Amended Complaint also noted that some small number of members may have damages less than $10,000. *Id.* Therefore, on December 17, 1990, the district court

tested the good faith allegation that each class member with friable asbestos in a school building who seeks compensatory and punitive damages has a claim exceeding $10,000. Thus, this part of the jurisdictional allegation was also not a contested issue before the court of appeals.

Moreover, it is undisputed that from the outset, there has been complete diversity of citizenship between all named class representatives and all defendants from each of the three consolidated complaints. There are, concededly, absent class members who are not diverse from defendants. This does not raise, however, a novel issue before the Court. It was decided many years ago by this Court that diversity of the named parties only is sufficient in representative suits, and this recently has been reaffirmed by Congress.

Kaiser Cement, **No. 90-1367**, challenges the Third Circuit's affirmance of the district court's final approval under Rule 54(b) of a partial class settlement with a codefendant. Not only does Kaiser Cement, a nonsettling defendant, lack standing to object to the settlement, but it has not shown any immediate prejudice from the settlement order, and it acknowledges that a term of the settlement was designed to protect nonsettling defendants' contribution and indemnity rights. The only alleged prejudice raised by Kaiser Cement involves a speculative and hypothetical possibility that a class member might challenge the settlement in a future proceeding in a different court. However, if that occurred and if the challenge were successful, the settlement necessarily would be voided as to that class member and consequently, nonsettling defendants, including Kaiser Cement, would be free to seek contribution and indemnity in that proceeding by way of a third party complaint against the settling defendant. In any event, jurisdictional amount issues are now moot.

NOTES (*Continued*):
effectively eliminated from the class those members with damages less than $10,000.

I. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE THIRD CIRCUIT'S REFUSAL TO GRANT MANDAMUS ON THE TRIAL COURT'S DISCRETIONARY RULING DENYING CLASS DECERTIFICATION.

Both of the Questions Presented by the W.R. Grace petitioners go to the decision of the Third Circuit that this was not an appropriate case for mandamus review of the denial of their class decertification motion. But only recently this Court has said once again that "the granting of an extraordinary writ is, in itself, extraordinary. [*In re McDonald*,] 489 U.S., at 184-185, 109 S.Ct., at 996; see *Kerr v. United States District Court*, 426 U.S. 394, 402-403, 96 S. Ct. 2119, 2123-2124, 48 L.Ed.2d 725 (1976)." *In re Sindram*, 111 S. Ct. 596, 597 (1991). Particular litigation hardships that might be suffered as a result of a discretionary, conditional, interlocutory order are not sufficient grounds for granting mandamus. "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Mandamus will not lie to correct a trial judge's exercise of discretion. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

Contrary to what petitioners contend, the Third Circuit did not adopt a rigid rule against mandamus in reviewing a class status ruling. It simply followed the established rule that mandamus hardly ever is appropriate to review such a ruling, reaffirming what it previously held in *DeMasi v. Weiss*, 669 F.2d 114 (3d Cir. 1982). As Judge Aldisert wrote:

> We do not write on a clean slate here. . . . In *DeMasi*, we held clearly that "a class action determination, affirmative or negative, is not a final order appealable under 28 U.S.C. § 1291," 669 F.2d at 119, that the only route open "for interlocutory review of the grant or denial of class certification, **at least in this case,** is pursuant to 28 U.S.C. § 1292(b)," *id.*, and that "[w]e will not employ mandamus in this case to circumvent these precepts." *Id.* **There are no circumstances in the matter before us now that were not present in** *DeMasi*.

(Grace App. at 9a) (citations omitted; emphasis added).

Petitioners overlook the fact that in the passage Judge Aldisert quoted from *DeMasi*, the court there spoke of "at least in this case" and again said "in this case." After that quotation Judge Aldisert said that there were "no circumstances in the matter before us" to require a different result. Words could hardly make it clearer that the court below was making a sensitive appraisal of particular cases and not, as petitioners would have it, announcing a categorical imperative.

In *DeMasi*, as here, petitioners never sought interlocutory review of the discretionary, conditional class ruling under 28 U.S.C. § 1292(b), which would have been an adequate alternative means for interlocutory review, and petitioners still had and have adequate means to review that ruling after final judgment. Petitioners' suggestion that as a practical matter there was no opportunity for effective interlocutory appellate review is belied by their admission that they were successful at an earlier stage before this same trial court in obtaining a Section 1292(b) certificate and the Third Circuit did review the class certification, affirming in part and reversing in part. (Grace Petition at 4, *citing*, *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986), *cert. denied*, 479 U.S. 852, 915 (1986)(2 cases)). Having had one full opportunity for interlocutory review, petitioners are now seeking in the eighth year of this litigation to disrupt the district court proceedings for a second time by rearguing the same issues before the Third Circuit.

Under these circumstances, the Third Circuit understandedly denied petitioners' attempt to circumvent well-settled principles governing the use of this extraordinary and drastic mandamus relief. No other circuits are in conflict with these familiar precepts. It is not coincidence that almost all of the purported conflicting cases cited by petitioners were decided in 1974-1977, before this Court clarified the rules about mandamus in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Allied Chemical Corp., v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).[13] Nor

13. In addition, those cases were decided before 1978 when this Court greatly cut back on immediate review of class certification decisions. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-470 (1978) (rejecting "death knell"

are any of the more recent cases cited by petitioners in conflict with the decision below, and, in any event, each is manifestly distinguishable from this case, which involves a petition for mandamus review of a trial court's provisional, discretionary order denying decertification in a Rule 23(b)(3) opt-out class action.[14]

Nor are the W.R. Grace petitioners any better off when they assert that it was an abuse of discretion for the Third Circuit not to grant them the writ they sought. The power to issue mandamus exists only when the litigant's right to the writ is "clear and indisputable." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). It cannot be an abuse of discretion not to issue the writ to reverse an order denying class decertification when other adequate alternative means existed and exist for petitioners to obtain the relief they seek. It is conceded that the district court acted within its jurisdiction in denying class decertification. It is conceded that petitioners never sought certification under Section 1292(b) of the order challenged here. It is conceded that petitioners had had full interlocutory review by the Third Circuit of the 1984 class certification order, following which certiorari was denied by this Court.

In addition to all this, review at this stage of the denial of decertification of the class would be wastefully premature. Under Civil Rule 23(c)(1) a class ruling "may be 'altered or amended before the decision on the merits.' Thus, a district

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and "collateral order" theories of review), *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (rejecting appeal under 28 U.S.C. §1292(a)(1)). "If there is to be immediate review of a class certification ruling, it must be by allowance of an interlocutory appeal under 28 U.S.C. §1292(b)." C. Wright, FEDERAL COURTS §101 at 704 (4th ed. 1983), *citing*, *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336 n. 8 (1980).

14. Three of those decisions dealt with certification of a mandatory no opt-out class for damages, two of them in a class settlement context. *In re Temple*, 851 F.2d 1269 (11th Cir. 1988) (mandatory limited fund class certified without record support, together with an injunction against all pending actions); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987) (mandatory settlement class for damages); *In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984) (mandatory settlement class for damages). Also distinguishable is *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (mandamus review of a class trial plan).

court's order denying or granting class status is inherently tentative." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n. 11 (1978). "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). This fact was explicitly recognized by the Third Circuit in 1986 when it upheld the initial certification of the class. "We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper." 789 F.2d at 1011. If the trial court should ever find that this litigation cannot be managed, it has full power to decertify the class. Surely an appellate court should not interfere by extraordinary writ when, as in this case, experience thus far has shown that use of the class action was a wise and productive decision.[15]

II. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE NOW MOOTED ISSUE OF THE AMOUNT-IN-CONTROVERSY REQUIREMENT WHEN THE DISTRICT COURT USED DISCRETION TO DEFER DISMISSING SOME CLASS MEMBERS.

The U.S. Gypsum petitioners, in their Question 1, and Kaiser Cement, in its Question 1(a), challenge the decision of the district court to defer dismissing from the class those members whose claims do not reach the applicable $10,000 requirement for amount in controversy.[16] Of course it is true

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15. The extensive discussion by the W.R. Grace petitioners (Grace Petition at 6-10, 15-19) of the problems they think will arise from Pretrial Order No. 233, governing trial structure, is also premature, and is not properly before this Court. That Order was entered on May 17, 1990 (Grace Petition at 1-2, 21a). The writ of mandamus that was sought from the Third Circuit was directed to the denial of decertification in Pretrial Order No. 203, entered on January 12, 1990 (Grace App. at 17a). The May 17th order was not before the Third Circuit on the mandamus petition and would not be before this Court if certiorari were to be granted.

16. This issue arose from plaintiffs' amended jurisdictional allegation that "The plaintiff and all members of the class (except a minimal portion thereof),

that every member of the class must satisfy the amount requirement of the statute. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). But there are three independent reasons why the action of the trial court is wholly consistent with *Zahn* and why this is not an issue worthy of this Court's attention.

First, the trial court was acting pursuant to the specific authority conferred by Civil Rule 12(d). That rule says that a motion challenging subject-matter jurisdiction is to be heard before trial "unless the court orders that the hearing and determination thereof be deferred until the trial." The district court did exactly what the rule allows it to do. *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988). Mandamus surely cannot issue to challenge a district court's exercise of discretion explicitly given to it by rules promulgated by this Court.[17]

Second, these petitioners forget — or deliberately ignore — that the district court undoubtedly had and has jurisdiction of the action. The question is at most whether certain unnamed members of the class are to be excluded from the class now or at a later time. The lower court is not proceeding "as a court of general, rather than limited, jurisdiction." (U.S. Gypsum Petition at 20). It is going forward to decide a case of which it surely has jurisdiction. At a later time it will determine whether all of the school districts described as members of the class are bound by the judgment. The U.S. Gypsum petitioners say (p. 20) that the ruling below means that "[a] plaintiff need no longer use a key to open the federal courthouse door, because the door is already open: the district court can now *presume* it has the

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have claims in excess of $10,000 . . . . Entities (not now identified) may exist which own or operate very small school systems in which no friable or potentially friable asbestos-containing material exists and for whom punitive damages may not be recoverable who cannot allege $10,000 in controversy." Amended Complaint in *School District of Lancaster v. Lake Asbestos of Quebec*, No. 83-0268 (E.D. Pa.), ¶ 4 (U.S. Gypsum App. at 82a, 91a).

17. The U.S. Gypsum petitioners claim they are entitled to an immediate decision under Civil Rule 12(h)(3), but Rule 12(h) indicates only when particular kinds of objections must be raised to avoid waiver. Rule 12(d) prescribes when motions are to be determined.

authority to resolve claims until proof to the contrary is presented." They are right that "the door is already open", but it is open because there are named plaintiffs with claims for more than $10,000 and citizenship diverse to that of defendants. The question is how many school districts can be allowed to go through the open door, and that turns on facts about individual districts that would be burdensome and unnecessary to decide at the present stage.

Third, any issue about amount in controversy is now out of the case. On December 17, 1990, four days after the decisions from the Third Circuit that are now being challenged before this Court, the district court amended the class definition to include "[o]nly those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building materials" and thus "only those school districts that can in good faith assert claims in excess of $10,000." Pretrial Order No. 273 and accompanying Memorandum at 1. (App. A-2). The class has now been limited in just the fashion that petitioners are urging, and their contentions in this regard are moot.

III. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW LONGSTANDING JURISPRUDENCE OF THE APPLICATION OF THE COMPLETE-DIVERSITY RULE IN REPRESENTATIVE ACTIONS.

Kaiser Cement, in its Question 1(b), and the W.R. Grace petitioners, in their Question 2, question whether the statutory requirement of diversity has been properly applied in this case. Indeed it has - but the question in any event would not merit the attention of this Court.

It is literally hornbook law that in a class action based on diversity of citizenship only the named parties need be considered in determining diversity. "It has long been the rule that in a class action only the citizenship of the named representatives is to be considered, and that it is no objection to jurisdiction that other members of the class, not named as parties, are of such citizenship as would defeat diversity." C. Wright, FEDERAL COURTS §72 at 484 (4th ed. 1983). The rule has its origin in the

well-known case of *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921). In *Snyder v. Harris*, 394 U.S. 332 (1969), the Court held that there can be no aggregation of the claims of class members to meet the statutory requirement of amount in controversy, but it noted with regard to diversity that: "[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant * * *." 394 U.S. at 340.

Petitioners assert that *Finley v. United States*, 490 U.S. 545 (1989), has changed this rule. Their interpretation of Finley is wrong. The fact is that there is not even a dictum, much less a holding, in *Finley* about class actions. It may be for that reason that the petitioners seek to put this into a larger context. The U.S. Gypsum petitioners say that "whether 'limited' diversity is sufficient in class actions has never been resolved by the Court" and that it ought to "address this important issue." (p. 29). Kaiser sees "ambiguity" (p. 25) about that question, but Kaiser paints a poignant picture of Congress caught up in "a 'judicial reform' tug of war" (p. 16) and argues that this case should be used "to provide guidance to the Congress as the ultimate arbiter of the extent to which federal courts should be statutorily empowered to hear state law claims." (p. 15; *see also* p. 17).

What all this pretty rhetoric ignores is that Congress has spoken to the problem. The Judicial Improvements Act of 1990 gives a clear answer. The purpose of that Act was "to implement several of the more noncontroversial recommendations of the Federal Courts Study Committee." H.R. Rep. No. 734 at 15, 101st Cong., 2d Sess. (1990), *reprinted in* 1991 U.S. Code Cong. & Ad. News, 6860, 6861. That Committee, feeling that "[r]ecent decisions of the Supreme Court raise doubts about the scope of pendent party and ancillary jurisdiction under existing federal statutes," REPORT OF FEDERAL COURTS STUDY COMMITTEE 47-48 (1990), recommended that "Congress should expressly authorize federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base." *Id.* at 47. As a distinguished member of the Study Committee,

former Solicitor General Rex Lee, said bluntly, this was intended "to overrule the restrictions on supplemental jurisdiction created by *Finley*." Lee & Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 333.[18] Congress responded by adopting 28 U.S.C. § 1367, Act of Dec. 1, 1990, Pub. L. 101-650, § 310, 104 Stat. 5089. Under subsection (a) of § 1367, district courts now have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Subsection (b) then limits supplemental jurisdiction with regard to some uses of Rules 14, 19, 20 and 24. Subsection (b) does not limit supplemental jurisdiction over counterclaims and cross-claims under Rule 13, impleader of a third party under Rule 14 (as opposed to the assertion by plaintiff of a claim against a third party who has been brought in under Rule 14), or, most significantly, class actions under Rule 23. The new statute was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." H.R. Rep. No. 734, 101st Cong., 2d Sess. at 29 (1990).

It cannot be doubted that prior to *Finley* it was understood that diversity is required only between the named representatives of the class and the opponents of the class. The House Judiciary Committee's citation of *Ben Hur* and *Zahn* (as Kaiser seems to recognize, p. 16 n.9) makes that clear, if indeed there could have been any doubt. Congress has undoubted power to adopt those rules. The requirement of complete diversity is a statutory requirement, not a constitutional one, and Congress may give the district courts jurisdiction over cases in which there is only minimal diversity. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-531 (1967). The rule for diversity jurisdiction in class actions is a subset of the established rule governing all representative actions. *See generally*, 13B C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND

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18. Indeed U.S. Gypsum recognizes this, even if rather grudgingly (p. 24, n.23).

PROCEDURE 2d §3606 at 424-25 (1984). The law prior to *Finley* was that only the citizenship of the named parties mattered.[19] The law in all actions commenced on or after December 1, 1990, is that only the citizenship of the named parties matters and that if the court has diversity jurisdiction with regard to them, it can hear claims of other parties that are part of the same case or controversy within the meaning of Article III. Surely this Court has more important things to do than deciding whether to extend *Finley* far beyond its specific holding to exclude from federal court claims by unnamed nondiverse parties in suits brought prior to December 1, 1990, especially when Congress has made it explicit that it wants the courts to hear such claims and it wants to restore the law as it was known before *Finley*.

IV. NO SPECIAL OR IMPORTANT REASON EXISTS FOR THIS COURT TO REVIEW THE APPROVAL OF THE LAQ CLASS SETTLEMENT BEING CHALLENGED BY NONSETTLING PETITIONER-CODEFENDANT WITHOUT STANDING.

The universal rule is that nonsettling defendants in multiparty actions do not have standing to object to a settlement with a codefendant except in narrow, constrained circumstances, *i.e.*, when defendants can demonstrate some prejudice through "a present or immediate injury in fact." *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Moreover, there must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type "likely to be redressed by a favorable decision." *Id.*; *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982). Kaiser Cement does

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19. Shortly before the 1990 Act, Congress similarly validated and did not change the generally-accepted principle that the citizenship of the representative controls in representative suits including class actions brought under the diversity statute. Congress amended 28 U.S.C. § 1332 in 1988 to create a specific exception under § 1332(c)(2) for the representative of an estate or of an infant or incompetent in order to eliminate the device of manufacturing diversity by appointing a representative from another jurisdiction. 14 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE §§3640, 3641 (Supp. 1991).

not even attempt to assert any present or immediate injury to it from the Lac d'Amiante du Quebec Ltee ("LAQ") settlement, in contrast to the petitioner in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), who had standing because "it would be obviously, and immediately injured if th[e] class-action judgment against it became final without binding the plaintiff class." *Id.* at 805. Phillips Petroleum Co. was the actual defendant in the action so it was vitally interested in how many plaintiffs were suing it directly. Kaiser's potential interest in the LAQ settlement is the protection of its contribution rights. Kaiser Cement acknowledges, however, that the settlement was purportedly designed to protect nonsettling defendants' contribution and indemnity rights, and the Third Circuit so found.

The only prejudice alleged by Kaiser Cement is the speculative and hypothetical possibility that a class member will challenge the settlement in a future proceeding, and as a result, Kaiser Cement's contribution and indemnity rights against LAQ may be diminished. However, it is axiomatic that the future *res judicata* effect of any judgment can only be determined by a later court. C. Wright, FEDERAL COURTS §72 at 483 (4th ed. 1983); RESTATEMENT SECOND OF JUDGMENTS §42 (1982). Moreover, even if such a future challenge were successful due to some defect in the settlement, then LAQ would not be protected by it,[20] and Kaiser Cement would be free to implead any third-party defendant, including LAQ, to test its contribution or indemnity rights in that collateral action.

It is the nature of a class action that frequently you cannot know exactly who is in the class until the claimants come in. Here, settling parties were fully aware of and contemplated at the time of the settlement (before the class definition was amended) the possibility that some class members (those from small school systems without friable asbestos and potentially no claim for punitive damages under state law) might be unable to

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20. *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973) (After finding that publication of notice of securities fraud class action in two newspapers on two separate occasions was fatally insufficient, the court held that "all subsequent proceedings pertaining to the settlement are devoid of validity and all settlement orders issued pursuant to those proceedings will therefore be vacated.").

assert claims in excess of $10,000. All parties accepted that if such absent class members existed outside the court's jurisdiction, they would not be bound by the settlement with LAQ.[21] Thus, LAQ, and not Kaiser Cement, is the only party prejudiced under this scenario, and the only party with standing to complain.

Finally, Kaiser Cement challenges jurisdiction of the certified national class based on local action principles. Kaiser's local action argument is not a proper subject for review on a petition for writ of certiorari seeking review of a partial class settlement and there is no conflict among the courts of appeals. The claims are transitory claims that could have arisen and did arise anywhere, and everywhere. *Dayton Independent School District v. U.S. Mineral Products Co.*, C.A. No. B-87-00507-CA, slip op. at 10 (E.D. Tx. Feb. 14, 1989).

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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21. LAQ stated in briefing before each of the courts below that it entered the settlement fully aware that it would not bind class members who are ultimately found to be outside of the trial court's jurisdiction, and that such class members could be free to seek individual relief. (App. A-7, A-10)

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Dated: March 29, 1991

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

Pretrial Order No. 273

[Filed December 17, 1990]

AND NOW, this 13th day of December, 1990, in consideration of the Plaintiffs' motion to amend the class definition, set forth in Pretrial Order No. 20, and the Defendants' responses thereto, it is ORDERED that the motion is granted and that the class definition is amended as proposed by the Plaintiffs. Only those school districts whose buildings contain, or contained before abatement, friable asbestos-containing building material will remain members of the Plaintiff Class.

BY THE COURT:

/s/ James McGirr Kelly

JAMES McGIRR KELLY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS SCHOOL LITIGATION	:	MASTER FILE NO. 83-0268
	:	
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

MEMORANDUM AND ORDER

[Filed December 17, 1990]

J. M. KELLY, J. **December 13, 1990**

Plaintiffs have moved this court to amend the class definition in these consolidated diversity actions. By Pretrial Order No. 20 (August 28, 1984) this court certified the Plaintiff Class as being comprised of all owners and operators of elementary and secondary schools in the United States. It appears that after several years of investigation and discovery the Plaintiffs have concluded that it would be appropriate to amend the class definition so as to include only those school systems that contain "friable" asbestos products, and thus only those school systems that can in good faith assert claims in excess of $10,000. Several defendants are in opposition to the proposed amendment of Pretrial Order No. 20, while one defendant, National Gypsum Company, supports the proposed amendment to the class definition. For reasons stated more fully below, this court will grant Plaintiffs' motion to amend the class definition.

Federal Rule of Civil Procedure 23(c)(1) provides, in reference to determinations that a case is maintainable as a class action, that "[a] determination once made can be altered or amended before a decision on the merits if, upon fuller development of the facts, the original determination appears unsound." In the extreme, this section of the rule permits a court to decertify a class and retract its approval of a litigation being brought as a class action. See *Valentino v. United States Postal Service*, 674 F.2d 56, n. 12 (D.C. Cir. 1982).

In more moderate circumstances, however, a court may merely alter or amend the class certification in keeping with its responsibility to reevaluate continually a case's class status as the case progresses. *See, e.g., Social Services Union, Local 535 v. County of Santa Clara*, 609 F.2d 944, 948-9 (9th Cir. 1979). The Second Circuit enunciated a similar responsibility in *Lamphere v. Brown University*, 553 F.2d 714, 720 (2d Cir. 1977), emphasizing "the need for the district court to follow closely the developing evidence as to class-wide decision making and to take seriously its power under Rule 23(c)(1) to alter or amend its certification order before the decision on the merits."

At the time this litigation was initiated, the types and amounts of asbestos products, if any, that were contained in the thousands of school buildings were unknown. The class was properly certified thereafter as inclusive of all elementary and secondary school systems. More than seven years later, the Plaintiffs have not distinctly identified asbestos containment on a building-by-building basis. However, the Complaint has been amended to focus on the presence of *friable* asbestos as the basis for Plaintiffs' claims. Congress has also recently passed legislation specifying that school districts must inspect for any asbestos and initiate maintenance with respect to friable asbestos-containing materials located in their buildings. Asbestos Hazard Emergency Response Act of 1986 ("AHERA").

In light of these developments, the Plaintiffs' proposed amendment to the class definition, narrowing class membership to include only those school districts whose buildings contain friable asbestos products, appears proper. "Friable" asbestos has been defined as material, "which, when dry may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *See, e.g.*, Third Amended Complaint. That it is *friable* asbestos containment for which this class action is seeking relief is consistent with Congress's determination that *friable* asbestos is the type for which school [sic] must implement maintenance plans. Adjusting the class definition correspondingly will streamline this litigation, ensuring that critical issues will be common to all class members.

The defendants who are in opposition to the proposed amendment assert three main arguments. Defendants first claim

that it would be improper for this court to amend the class definition while diversity jurisdiction issues are pending before the Third Circuit. However, the fact that the Third Circuit is currently considering related jurisdictional issues does not prevent this court from properly managing the class. The Plaintiffs have suggested that the class definition be amended in order that only members with claims in excess of the required jurisdictional amount ($10,000) remain in the class. As that is required under *Zahn v. International Paper Co.*, 414 U.S. 291 (1983) [sic], it is not improper to consider the proposed amendment.

Second, the defendants in opposition assert that many class plaintiffs who have relied on the litigation will be unfairly excluded by the amendment without notice. The situations in which notice to absent class members is required under Rule 23 are limited. Notice is required when the court certifies a class under Rule 23(b)(3) because of common issues of law or fact that predominate over other aspects of the suit and render a class action the appropriate vehicle to resolve claims. Fed.R.Civ.P. 23(c)(2). Notice is also required when a class action is to be dismissed or compromised. Fed.R.Civ.P. 23(e). In instances such as here, where an amendment to the class definition has been proposed, notice is not required but discretionary notification is encouraged where the plaintiff has shown that excluded class members: (1) received notice of their original inclusion in the class; (2) relied on the class suit to protect their interests; and (3) would be prejudiced as a practical matter by their exclusion. *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989).

Plaintiffs' amendment will undoubtedly trim the class by excluding school districts whose buildings do not contain friable asbestos; however, those parties will not be unduly prejudiced as a result. As stated above it is the containment of *friable* asbestos for which Congress has required maintenance plans be implemented, and for which Plaintiffs have amended their Complaint to address. In light of these developments, it is no longer appropriate for any and every school district to remain a class member. It has become clear that *friable* asbestos is the focus of Plaintiffs' claim for relief. Any claims made by school districts not containing friable asbestos in their buildings are distinct and arguably would be prejudiced if forced to remain

and be tried side by side with friable asbestos claims. Notice to excluded class members of the redefinition of the class is not required under these circumstances.

The defendants' third basis for opposition to the proposed amendment centers around the meaning of the term "friable", suggesting that issues of vagueness and timing regarding friable asbestos mandate the rejection of Plaintiffs' proposed class redefinition. However, any questions needing to be resolved regarding the presence of friable asbestos products and the concomitant effects their resolution would have on class membership are no more problematic than those that occur in most class litigation. Although, as defendants state, the class definition must be reasonably specific, by nature the definition of a class and the subsequent determination of its membership require some inquiry and investigation as to the individual class members to ensure the propriety of their inclusion.

In *Crosby v. Social Security Administration of the United States*, 796 F.2d 576 (1st Cir. 1986), cited by the defendants, the class definition was rejected because it necessitated the determination of a subjective issue - what as a "reasonable time" within which a hearing should have been granted - for each individual potential class member. That is not this case. Here, under the proposed amendment, an *objective* determination - the existence of friable asbestos products in school buildings - will be used to determine membership in the class. This is not beyond the bounds of reasonable specificity for purposes of defining the class.

The issue of timing raised by the defendants does not prevent the proposed amendment to the class definition. All of the Plaintiffs' buildings were completely constructed prior to the initiation of this action. Thus the issue for purposes of determining membership in the class is simply whether or not the Plaintiffs' schools were constructed using asbestos materials that are friable, the term friable being defined as "*which, when dry*, may be crumbled, pulverized, reduced to powder by hand pressure, or which otherwise is easily damaged." *supra*, p. 3 (emphasis added). This does not require a determination of *when* each product becomes, or became friable. All that is necessary is for Plaintiffs to identify the school districts that

contain friable asbestos materials. All such school districts shall remain class plaintiffs under the amended class definition.

An appropriate order follows.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 90-1247
NO. 90-1248

IN RE: SCHOOL ASBESTOS LITIGATION

School District of Lancaster, et al.,

Plaintiffs

v.

Lake Asbestos of Quebec, Ltd., et al.,

Defendants.

United States Gypsum Company
and
Kaiser Cement Corporation,

Appellants.

Appeal From Final Judgment Of
The United States District Court For The
Eastern District of Pennsylvania,
Master File No. 83-0268

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SUMMARY OF ARGUMENT

After more than six years of litigation, LAQ entered into an agreement to settle this certified nationwide class action for one million dollars. LAQ, a peripheral defendant in asbestos property damage litigation, was fully aware of the then-pending attacks on the District Court's subject matter jurisdiction when it entered into the settlement agreement; indeed, the agreement expressly acknowledged that the settlement would be voided if there were no subject matter jurisdiction.

* * *

Appellants, as part of their overall strategy to derail this litigation, objected to preliminary and final approval of the settlement before the District Court, on the ground that the District Court lacked subject matter jurisdiction to approve the settlement. They appeal here on the same ground, arguing that a partial settlement cannot become final in a diversity class action unless the damage claims of each absent class member are determined first. These objections are an attack on use of the class action device when a court's diversity jurisdiction is invoked, not an attack on the LAQ settlement itself. Appellants' speculation that some few class members exist over whose claims the District Court lacks jurisdiction does not give them standing to challenge final approval of the LAQ settlement. The settlement does not bind class members whose claims are less than $10,000, and it does not purport to do so. LAQ alone bears the risk of any uncertainty that certain claims may not be barred by the settlement. It has accepted the risk, and no one else should be heard to complain on its behalf.

* * *

ARGUMENT

* * *

C. These Appeals Should Be Dismissed Because Appellants' Claim of Legal Prejudice Procedure Is Wrong Both As A Matter of Fact And As A Matter Of Law.

* * *

. . . At this point, only LAQ bears the risk of not knowing the precise scope of the *res judicata* effect it obtained through its settlement, and LAQ has knowingly assumed that risk. The only

purpose served by these present appeals is the disruption of a settlement approval process that should only involve the District Court and the parties to the settlement.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: SCHOOL ASBESTOS
LITIGATION

MASTER FILE
NO. 83-0268

THIS DOCUMENT RELATES TO:
ALL ACTIONS

LAC D'AMIANTE DU QUEBEC, LTEE'S MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF THE SETTLEMENT BETWEEN LAQ AND THE PLAINTIFF CLASS

THE OBJECTIONS FILED BY NON-SETTLING DEFENDANTS PRESENT NO VALID REASON FOR WITHHOLDING FINAL APPROVAL OF THE SETTLEMENT

Two non-settling defendants have also filed objections to final approval of the settlement. United States Gypsum Company ("USG") and Kaiser Cement Company ("Kaiser") have taken this opportunity to restate their twice-rejected challenge to this Court's subject matter jurisdiction. These defendants have no standing to repeat their jurisdictional arguments in this context.

Defendants assert that they have "a real stake in ensuring that their rights under the judgment reduction provision are recognized and that . . . class members will be bound by this obligation." Kaiser Objection at 2. This concern is unwarranted. The judgment reduction provisions of the settlement agreement are not applicable until a Class member obtains a judgment against a defendant. In order for a Class member to obtain a valid judgment in this action, the Court must have subject matter jurisdiction and the judgment reduction provision will,

accordingly, be binding on that Class member. If the Court were to determine that it did not have subject matter jurisdiction over a Class member's claims, that Class member is not bound by the settlement agreement, but neither will any defendant be liable to that Class member in this litigation.* Thus, non-settling defendants lack standing to object to the settlement even on the limited basis they propose.

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*Moreover, Class members whose claims were not within the Court's subject matter jurisdiction would not be subject to any judgment reduction as a result of the LAQ settlement because they would not be entitled to participate in the settlement proceeds.

No. 90-1367
No. 90-1378

FILED
APR 3 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

vs.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

vs.

BARNWELL SCHOOL DISTRICT NO. 45, SCHOOL DISTRICT OF LANCASTER, MANHEIM TOWNSHIP SCHOOL DISTRICT, LAMPETER-STRASBURG SCHOOL DISTRICT, BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, And A Conditionally Certified Class,
Respondents,

– and –

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the Court of Appeals for the Third Circuit affirming the district court's finding that non-settling defendants lack standing to challenge a partial settlement, where the decision below did not decide the questions presented by petitioners on subject matter jurisdiction and applied well-settled law to deny standing?

STATEMENT PURSUANT TO RULE 29.1

Respondent Lac d'Amiante du Quebec, Ltee is a wholly owned subsidiary of ASARCO Incorporated. Lac d'Amiante du Quebec, Ltee has no nonwholly owned subsidiary companies.

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No. 90-1367
No. 90-1378

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,
Petitioner,

vs.

LAKE ASBESTOS OF QUEBEC, LTD., et al.,
Respondents.

UNITED STATES GYPSUM COMPANY, et al.,
Petitioners,

vs.

BARNWELL SCHOOL DISTRICT NO. 45,
SCHOOL DISTRICT OF LANCASTER,
MANHEIM TOWNSHIP SCHOOL DISTRICT,
LAMPETER-STRASBURG SCHOOL DISTRICT,
BOARD OF EDUCATION OF THE MEMPHIS
CITY SCHOOLS, And A Conditionally Certified Class,
Respondents,

—and—

THE HONORABLE JAMES MCGIRR KELLY,
Nominal Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Lac d'Amiante du Quebec, Ltee ("LAQ") respectfully requests that this Court deny petitioners' writs of certiorari that seek review of the opinion of the United States Court of

Appeals for the Third Circuit, *In re School Asbestos Litigation*, Nos. 90-1247 & 90-1248, reported at 921 F.2d 1330.[1]

OPINIONS BELOW

The LAQ settlement opinion is reported at 921 F.2d 1330, and is reprinted in petitioners' appendices at Kaiser Appendices to Petition No. 90-1367 ("Kaiser App.") 1a-20a and U.S. Gypsum Petitioners Appendices to Petition No. 90-1378 ("U.S. Gypsum Pet. App.") 45a-63a. The opinion of the district court has not been reported. It is reprinted in petitioners' appendices at Kaiser App. 21a-26a and U.S. Gypsum Pet. App. 119a-124a.

STATUTORY PROVISION INVOLVED

No statutory provisions were involved in the LAQ settlement opinion.

STATEMENT OF THE CASE

The only facts essential to the Court's determination whether to grant or deny these petitions for certiorari, which seek review of the judgment and opinion of the Court of Appeals for the Third Circuit on the standing of Kaiser and U.S. Gypsum to contest the partial settlement between LAQ and plaintiffs, are these:

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[1] There are two petitions for writs of certiorari to review the court of appeals' opinion which affirmed a partial final judgment of the district court dismissing with prejudice the claims against settled defendant LAQ ("LAQ settlement opinion"). One petition, filed only on behalf of Kaiser Cement Corporation ("Kaiser"), seeks review of the LAQ settlement opinion alone. The other petition, filed on behalf of U.S. Gypsum Company ("U.S. Gypsum"), Kaiser Gypsum Company, Inc. (a subsidiary of Kaiser, represented in this action by the same counsel of record), W.R. Grace & Co. and Fibreboard Corporation (collectively, "the U.S. Gypsum petitioners") seeks review of both the LAQ settlement opinion and another court of appeals' opinion, which denied consolidated petitions for writs of mandamus and prohibition based on petitioners' failure to show that the district court lacked subject matter jurisdiction under 28 U.S.C. §1332(a) ("subject matter jurisdiction opinion"). In this brief, LAQ responds only to petitioners' requests for review of the LAQ settlement opinion.

The action from which these petitions arise is a class action on behalf of elementary and secondary schools seeking damages for the presence of asbestos-containing construction materials in their buildings. LAQ and class plaintiffs executed an agreement settling plaintiffs' claims against LAQ on March 31, 1989. The agreement called for LAQ to pay $1,000,000 to the class. In exchange, class members agreed to dismiss their claims against LAQ with prejudice. The settlement agreement specifically provides that in the event any defendant were to obtain a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against such defendant would be reduced by any "amount, percentage or share of such judgment attributable to LAQ."[3]

Kaiser and U.S. Gypsum opposed the district court's preliminary approval of the settlement between LAQ and class plaintiffs.[4] On November 22, 1989, the district court gave preliminary approval to the settlement between LAQ and plaintiffs as reasonable, adequate and fair, and directed that notice of the settlement be given to class members.

Kaiser and U.S. Gypsum also objected to the district court's final approval of the LAQ settlement. On February 16, 1990, the district court approved LAQ's settlement with the class and directed that final judgment be entered under Fed. R. Civ. P. 54(b). Kaiser App. 21a-26a, 30a-33a; U.S. Gypsum Pet. App. 119a-128a. The district court also held that Kaiser and U.S. Gypsum had failed to show they had standing to contest the settlement under any exception to the general rule that non-settling defendants lack standing to object to a partial settlement.

Kaiser and U.S. Gypsum appealed the district court's approval of the LAQ settlement, attacking the court's assertion of subject

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[3] The full text of paragraph 12 of the LAQ settlement agreement is set forth in the court of appeals opinion. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 9a; U.S. Gypsum Pet. App. 51a-52a.

[4] Petitioners W.R. Grace & Co. and Fibreboard Corporation did not challenge the LAQ settlement in the courts below.

matter jurisdiction and the process through which the court approved the settlement, but not the reasonableness of the LAQ settlement agreement itself. On December 13, 1990, in its LAQ settlement opinion, the court of appeals affirmed the judgment of the district court, holding that Kaiser and U.S. Gypsum lacked standing to challenge the settlement agreement between LAQ and the plaintiff class. *In re School Asbestos Litigation*, 921 F.2d 1330; Kaiser App. 1a-20a; U.S. Gypsum Pet. App. 45a-63a. The court of appeals found that appellants did not have standing based on any adverse effect on their contribution or indemnity rights because the settlement agreement and the order approving the settlement contained no limit on any claims of non-settling defendants. The court of appeals did not reach the issue whether adequate notice procedures were followed in the settlement approval process. Having determined in a separate opinion, filed the same day, that subject matter jurisdiction was proper in the district court, the court of appeals did not reconsider subject matter jurisdiction in the LAQ settlement opinion.

Following the court of appeals' denial of their petitions for rehearing and suggestions for rehearing *en banc*, Kaiser App. 83a-86a; U.S. Gypsum Pet. App. 79a-81a, petitioners sought writs of certiorari to review the judgments and opinions of the Third Circuit Court of Appeals. In these petitions, Kaiser and the U.S. Gypsum petitioners again argue that the district court lacks subject matter jurisdiction over the claims from which LAQ was dismissed. Only Kaiser argues that it was improperly denied standing by the court of appeals.

REASONS FOR DENYING THE WRITS

1. THE COURT OF APPEALS FOR THE THIRD CIRCUIT DID NOT DECIDE THE QUESTIONS PRESENTED BY THE U.S. GYPSUM PETITIONERS.

The court of appeals did not decide the questions raised by the U.S. Gypsum petition for writs of certiorari. In the LAQ settlement opinion, the court of appeals merely held that Kaiser and U.S. Gypsum lacked standing to challenge the LAQ settlement

agreement. *In re School Asbestos Litigation*, 921 F.2d at 1331-33; Kaiser App. 5a-10a; U.S. Gypsum Pet. App. 48a-53a. The court determined that Kaiser and U.S. Gypsum lacked standing because the settlement agreement specifically recognized the existence of non-settling defendants' indemnification and contribution rights against LAQ, and the district court's approval of the settlement contained no ruling purporting to limit any claims non-settling defendants may have. *Id.* at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The only Questions Presented by the U.S. Gypsum petitioners, *see* U.S. Gypsum Petition at i, concern the sufficiency of plaintiffs' allegations to support diversity subject matter jurisdiction, and diversity among individual members of a plaintiff class and defendants.* The court of appeals addressed these issues in a separate, comprehensive opinion holding that none of petitioners' arguments on jurisdictional defects demonstrated a lack of federal diversity subject matter jurisdiction to require dismissal of the action. *See In re School Asbestos Litigation*, 921 F.2d 1310 (3d Cir. 1990); Kaiser App. 34a-76a; U.S. Gypsum Pet. App. 1a-44a. Having found jurisdiction proper in the district court, the court of appeals did not and need not have re-determined in the LAQ settlement opinion whether plaintiffs' allegations supported subject matter jurisdiction over the action. Indeed, the court of appeals explicitly separated the issues raised in its two opinions, noting that it had concluded its treatment of the subject matter jurisdiction question before considering the appeal taken from the LAQ settlement. *In re School Asbestos Litigation*, 921 F.2d at 1332; Kaiser App. 5a-6a; U.S. Gypsum Pet. App. 49a.

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* The first of two Questions Presented by Kaiser, *see* Kaiser Petition at i, also seeks review of various subject matter jurisdiction issues. Although it also purports to challenge the dismissal of the class members' claims against LAQ, it does not seek review of the standing decision in the LAQ settlement opinion. Only Kaiser's second Question Presented concerns standing to challenge the LAQ settlement. The court of appeals had no occasion to consider the precise issue Kaiser raises in its second Question Presented, *viz.*, whether non-settling defendants can raise alleged defects in the settlement approval process. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The U.S. Gypsum petitioners have also sought writ of certiorari to review the court of appeals' subject matter jurisdiction opinion. *See supra* p. 2, note 1. The court of appeals did not decide subject matter jurisdiction in the LAQ settlement opinion, and writ of certiorari to review that opinion would not lead to consideration of the jurisdictional questions the U.S. Gypsum petitioners present.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY APPLIED THE CORRECT RULE OF LAW IN DENYING PETITIONERS STANDING TO CHALLENGE THE LAQ SETTLEMENT.

There is no conflict among the circuits on the legal standard a court should apply to determine whether a non-settling defendant has standing to object to a partial settlement. As set forth in the leading appellate authorities, a non-settling defendant does not have standing to object to a partial settlement unless it can show some cognizable prejudice to a legal relationship between it and the settling parties. *Waller* v. *Financial Corp. of America*, 828 F.2d 579 (9th Cir. 1987); *Quad/Graphics, Inc.* v. *Fass*, 724 F.2d 1230 (7th Cir. 1983); *In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Utility Contractors Ass'n of New Jersey, Inc.* v. *Toops*, 507 F.2d 83 (3d Cir. 1974). The court of appeals employed this standard, *In re School Asbestos Litigation*, 921 F.2d at 1332-33; Kaiser App. 7a-8a; U.S. Gypsum Pet. App. 51a, and even the dissenting judge, upon whose opinion petitioners place so much reliance, agreed with the majority that this standard should apply. *Id.* at 1335; Kaiser App. 14a; U.S. Gypsum Pet. App. 57a.

Kaiser seems to suggest that the standard of law used by the court of appeals should not govern in this case.* The essence of

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* Kaiser argues that the standard applied by the court of appeals is inapplicable because it was developed in antitrust litigation where defendants have no rights

(Footnote continued)

Kaiser's position is that where there are rights of contribution or indemnity among defendants, any partial settlement may affect those rights, and therefore non-settling defendants should automatically have standing. Kaiser Petition at 28, n.17. In the standing analysis, however, there is no talismanic significance to non-settling defendants' rights to contribution or indemnity. The uncontroverted standard of law on non-settling defendants' standing to object to a partial settlement is applied where rights to contribution and indemnity are made an issue just as it is to any other issue. Any other rule would discourage settlements in complex litigation, because settlement would not fully extricate a defendant from the litigation in which he sought to buy his peace. *See In re School Asbestos Litigation*, 921 F.2d at 1333; Kaiser App. 9a-10a; U.S. Gypsum Pet. App. 52a.

No appellate court has found reason to vary the long-accepted standard on non-settling defendants' standing to contest partial settlements. The court of appeals employed the correct rule of law, and its decision raises no novel legal issue that requires review by this Court.

A. The Court of Appeals' Decision Correctly Applied Well-Settled Law.

The court of appeals' decision denying petitioners' claim that their rights to contribution or indemnity were prejudiced by the LAQ settlement is merely a case-specific application of the universally-accepted rule that a non-settling defendant does not have standing. The decision reflected an appropriate appellate response to review of a settlement agreement, which, like many settlements in multiple-defendant cases involving joint and

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of contribution at all. Kaiser Petition at 27-28, n.16. Kaiser is wrong. Although the Fifth Circuit's influential decision in *In re Beef*, which Kaiser cites to support its position, arose in the context of an antitrust class action, it was neither the first time such a standard was enunciated, *see Tsopa*, 507 F.2d at 86 (dispute between class of unions and class of municipalities over partial settlement), nor the only context in which the courts have applied this standard. *See, e.g., Waller*, 828 F.2d at 583 (Rule 10b-5 class action); *Quad/Graphics*, 724 F.2d at 1233 (corporate contract dispute).

several liability, preserved non-settling defendants' rights to contribution or indemnity in the form of a judgment reduction provision.

Kaiser argued below that it had suffered legal prejudice and hence had standing to challenge the LAQ settlement because the settlement agreement barred it from pursuing claims for contribution or indemnity against LAQ. The court of appeals held that petitioners had failed to demonstrate legal prejudice. Specifically, the court of appeals found that the settlement agreement expressly took account of these petitioners' rights of contribution and indemnity:

> [t]he settlement agreement in this case specifically recognizes the existence of indemnification and contribution rights of non-settling defendants and the Order approving the settlement contains no ruling purporting to limit any claims non-settling defendants may have.

In re School Asbestos Litigation, 921 F.2d at 1333; Kaiser App. 10a; U.S. Gypsum Pet. App. 53a.

The court of appeals referred to paragraph 12 of the LAQ settlement agreement, which allows for the operation of state laws governing contribution and indemnity rights in partial settlements and accounts for non-settling defendants' rights to contribution and indemnity by incorporating a judgment reduction provision. This provision reflects the fact that, under *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), issues of indemnity or contribution in this diversity class action will be resolved under the differing laws of the jurisdictions in which the substantive claims of the class members arise.

As the court of appeals found, the terms of the LAQ settlement agreement expressly provide that in the event a non-settling defendant were to obtain a judgment against LAQ for contribution or indemnification, any judgment obtained by the class against that defendant would be adjusted by any portion of

the recovery attributable to LAQ. When, as here, a settlement agreement specifically provides for non-settling defendants' rights to contribution and indemnity, the "legal prejudice" exception to the rule against co-defendant standing is not satisfied. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litigation*, 564 F. Supp. 1379, 1387 n.11 (D. Md. 1983) (non-settling defendants lacked standing where settlement expressly provided for a *pro rata* reduction of damages against the non-settling defendants should settling defendants be liable for contribution under state law).[8] The LAQ settlement agreement does not, in and of itself, extinguish any of petitioners' legal rights and, as the court of appeals correctly found, neither did the district court's order approving the settlement.

It might be a different issue, but not the issue presented below, if a settlement agreement purported to ignore or defeat non-settling defendants' rights to contribution or indemnity as a condition of the settlement. *See Franklin v. Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 232 (1990) (non-settling defendants in a securities class action had standing to object to a partial settlement that was expressly conditioned on obtaining an order from the district court barring non-settling defendants' pre-existing rights to contribution and indemnity). The court of appeals properly found that under the terms of the LAQ settlement, petitioners suffered no legal prejudice and hence had no standing.

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[8] *See also*, 2 H. Newberg, *Newberg on Class Actions* §11.54 n.472 (2d ed. Supp. 1990.)

When a class settlement agreement includes a provision that future contribution judgments will be handled according to applicable law or, in the absence of statute, by a reduction in the judgment against non-settling defendants by the amount of any contribution judgment against settling defendants, such a settlement provision expressly recognizes potential contribution rights of non-settling parties, and does not strip them of any rights of contribution or indemnity. Under these circumstances, non-settling defendants do not gain standing to challenge a settlement by another defendant in multi-party litigation, based on grounds that their contribution or indemnity rights are being affected by the proposed settlement.

B. The Court of Appeals' Decision Denying Kaiser Standing Does Not Conflict With This Court's Decision In *Shutts*.

Petitioner Kaiser asserts, in reliance upon *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), that it should have had standing to object to the district court's notice procedures to ensure that all class members are bound by the judgment reduction provisions of the settlement. Kaiser Petition at 29. Kaiser's argument is a tempest in a teapot. If in the future, a plaintiff were to challenge the *res judicata* effect of the judgment effecting the LAQ settlement and a court were to find that notice of the settlement had been inadequate, the judgment would not bind the plaintiff who had received inadequate notice. He would then be unable to share in the settlement proceeds and free to commence a separate action against LAQ. To the extent LAQ and Kaiser were both named in the subsequent action and Kaiser had a valid contribution claim against LAQ,[7] Kaiser could seek a judgment over for contribution or indemnity directly from LAQ in that later action. Conversely, if notice of the LAQ settlement was adequate, then the judgment effecting the settlement agreement is binding and the contribution and indemnity provisions therein can be enforced by Kaiser against class members.

This analysis is in no way altered by this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* neither varies nor creates a new exception to the rule against standing for non-settling defendants to attack a partial settlement. *Shutts* was decided on the appeal of the sole defendant in the action following a final liability judgment against it. Kaiser conveniently overlooks this central — and dispositive — distinction between *Shutts* and the partial settlement posture

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[7] In this action, claims for contribution and indemnity between a supplier of raw asbestos fiber, such as LAQ, and a manufacturer of asbestos construction products, such as Kaiser, will largely, if not exclusively, be determined by their purchase and sale relationship. LAQ never supplied or sold any asbestos fiber to Kaiser.

in which the court of appeals considered the LAQ settlement. In *Shutts*, no other party shared the defendant's interest in ensuring the broadest possible preclusive effect of the judgment. Non-settling defendant Kaiser, however, suffers no legal prejudice as a result of being denied standing to critique the form or manner of notice of LAQ's partial settlement, because LAQ's interest in ensuring the maximum preclusive effect of notice to the class, and the district court's obligation to review the settlement notice, adequately protect Kaiser's interests as a matter of law. *See In re Viatron Computer Systems Corp. Litigation*, 614 F.2d 11, 14-15 (1st Cir.), *cert. denied*, 449 U.S. 826 (1980) (non-settling defendant lacks standing to attack adequacy of partial settlement notice); *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 172-73 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (same).

Kaiser cannot demonstrate that any feature of the LAQ settlement or the notice and approval procedures employed by the district court has injured it. Kaiser has retained the benefits of all rights it is entitled to under the law as a non-settling defendant. Kaiser cannot show legal prejudice, and thus has no standing.

CONCLUSION

For the reasons set forth above, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KAISER CEMENT CORPORATION,

Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., *et al.*,

Respondents.

KAISER CEMENT CORPORATION'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 1367

KAISER CEMENT CORPORATION,

Petitioner,

v.

LAKE ASBESTOS OF QUEBEC, LTD., *et al.*,

Respondents.

KAISER CEMENT CORPORATION'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Kaiser Cement's Petition seeks review of a decision by a divided panel of the Third Circuit Court of Appeals that dramatically expands federal jurisdiction to adjudicate state law claims through the Rule 23(b)(3) class action device. Both plaintiffs' Consolidated Opposition and LAQ's Brief in Opposition attempt to downplay the decision's far-reaching impact. However, neither disputes that the Court of Appeals permitted the district court to dismiss with prejudice the claims of all members of the nationwide, diversity-based class against settling defendant LAQ even though

- the complaints alleged that some class members did not have claims in excess of $10,000 and defendants had established that 60% could not satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a);
- the complete diversity requirement of § 1332(a) also could not be met because some named class repre-

sentatives and many, if not most, plaintiff class members were citizens of the same states as some of the defendants; and

- the complaints presented claims for injury to real property located outside the forum state in contravention of decisions by this Court that the local action doctrine requires such claims to be decided by a court sitting in the state where the property is found.

Kaiser Cement's Petition pointed out that it was improbable that these jurisdictional rulings could be confined to the present case in light of current interest in the use of class action procedures as a means of dealing with so-called "mass tort" claims arising under state laws. In this atmosphere, the Third Circuit's rulings, if allowed to stand, provide a misleading jurisdictional signal to other district courts and to legislators considering proposals to encourage such class actions. Rather than ceding such influence to the panel's majority opinion, Kaiser Cement urged the Court to grant its Petition in order to provide needed guidance to the lower courts and to Congress.

I. PLAINTIFFS' RELIANCE ON THE JUDICIAL IMPROVEMENTS ACT OF 1990 ITSELF DEMONSTRATES THE IMPORTANCE OF REVIEWING THE COMPLETE DIVERSITY OF CITIZENSHIP ISSUE.

In response to Kaiser Cement's reasons for granting its Petition, plaintiffs contend (at 11) that this Court's guidance is no longer necessary because Congress has already "spoken to the problem. The Judicial Improvements Act of 1990 gives a clear answer."[1] However, plaintiffs do not claim that this Act provides any answer to the local action or amount in controversy issues raised herein. Even with regard to complete diversity of citizenship, plaintiffs acknowledge (at 13) that the Act does not govern this case

[1] Plaintiffs' repeated protestations that the Third Circuit's jurisdictional rulings are not "special or important" is belied by the fact that the cover of their Opposition indicates that it required the efforts of two dozen class action lawyers (counting Professors Wright and Miller) to respond to Kaiser Cement's Petition.

or other diversity-based class actions that were filed prior to December 1, 1990 but argues (at 12-13) that the Act has resolved the complete diversity of citizenship issue for class actions filed after December 1, 1990.

This attempt to minimize the Third Circuit's decision as affecting "only" pre-December 1, 1990 filings is at odds with plaintiffs' own recognition (at 12) that Congress expressly directed that the Judicial Improvements Act of 1990 was "not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to *Finley*." Nor did Congress spell out these requirements beyond citing *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). *See* Petition at 16 & n.9.

Thus, determining whether 28 U.S.C. § 1332(a)'s complete diversity requirement applies to Rule 23(b)(3) class actions filed after December 1, 1990 will turn on the interaction between *Ben-Hur* and *Zahn*. Indeed, plaintiffs concede that the issue is the same when they assert (at 13) that, prior to *Finley*, "only the citizenship of the named parties mattered" and that, after December 1, 1990, "only the citizenship of the named parties matters."[2]

In the present pre-December 1, 1990 case, plaintiffs assert that *Ben-Hur*, rather than *Zahn*, controls the juris-

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[2] If anything illustrates the need for guidance in this area, it is plaintiffs' claim (at 12) that "diversity is required only between the named representatives of the class and the opponents of the class." In the present case, it is undisputed that some of the "named representatives of the class" such as the School District of Lancaster, a citizen of Pennsylvania, are not diverse from some of the "opponents of the class" such as defendant Pittsburgh Corning, also a Pennsylvania citizen. *See* Petition at 22 n.11.

The Third Circuit's affirmance of the LAQ final judgment in the face of this lack of diversity between even the "named parties" is directly in conflict with the Second Circuit's decision in *In re Agent Orange Product Liability Litigation*, 818 F.2d 145, 162 (2d Cir. 1987).

dictional requirements for a Rule 23(b)(3) class action. But, as demonstrated in Kaiser Cement's Petition (at 23-24), the class action involved in *Ben-Hur* was not a Rule 23(b)(3)-type, where class members are permitted to join their separate and distinct claims. It was instead a contest for control of a fund in which all class members had a common but indivisible interest. In *Aldinger v. Howard*, 427 U.S. 1, 11 (1976), the Court explained that *Ben-Hur* had permitted this type of class action to proceed on the basis of the citizenship of only the named parties by invoking "ancillary" jurisdiction over non-diverse absent class members so that their interests in the common fund would be protected. However, in the absence of the necessity created by such a common fund, *Zahn* rejected resort to such ancillary jurisdiction principles in Rule 23(b)(3) class actions. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978). Nonetheless, plaintiffs characterize (at 12) such class actions as being subject to a subset of an "established rule" governing "representative" actions that requires diversity only among the named parties.

But *Zahn* did not adopt a "representative-action" rule for Rule 23(b)(3) class actions; instead, it held that such class actions were subject to the same jurisdictional "rule" that governed "named plaintiffs joining in an action." Under this joinder rule, the "matter in controversy" of each class member must independently satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a). *See* 414 U.S. at 300-01 & n.9. Kaiser Cement submits that *Zahn*'s interpretation of the "matter in controversy" language in 28 U.S.C. § 1332(a) leads inescapably to the conclusion that each defendant and each member of a Rule 23(b)(3) class must also satisfy the citizenship requirement of that statute, *i.e.*, each must be "citizens of different States." Whether or not Kaiser Cement is correct on this score, the time has come to resolve the issue not only because of its significance for the present litigation[3] but also be-

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[3] Plaintiffs claim (at 1) that "much progress has been made in eight years of the present litigation," since "[s]ettlements totaling in excess

cause it will impact on a number of currently pending cases as well as those filed in the future.

This issue may also substantially affect legislative initiatives directed at court reform. For example, after the Petition herein was filed, the Judicial Conference of the United States approved a Report of its Ad Hoc Committee on Asbestos Litigation,[4] which concluded (at 36) that "the costs and burdens of federal asbestos litigation could be lessened . . . if Congress would expressly authorize class actions or collective trials." The Report also recommended (at 37-38) that the Advisory Committee on Civil Rules should "study whether Rule 23 of the Federal Rules of Civil Procedure should be amended to accommodate the demands of mass tort litigation."

Despite making these recommendations, the Committee's Report did not explore jurisdictional limitations on the use of Rule 23 class actions to adjudicate state law claims or purport to find that the Judicial Improvements Act of 1990 had swept away those limitations. Before Congress and the Advisory Committee undertake the efforts recommended by the Judicial Conference, it is of "paramount importance" that they do so against a "background of clear interpretative rules" governing the jurisdictional limits on Rule 23 class actions. *Cf. Finley v. United States*,

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of $40 million have been reached between the class and six of the defendants" and since "trial" is scheduled to begin in 1991.

For a more complete description of the phase 1 trial schedule, *see* note 7 *infra*. As for settlements, the district court has actually approved only four totalling less than $6 million. A substantial portion of the discrepancy between $6 million and $40 million can be explained by the fact that, before going bankrupt, defendant National Gypsum entered into an agreement to use its best efforts to persuade its insurers to pay $31 million to settle this litigation. However, National Gypsum's counsel recently reported that its insurers refused to pay and that the settlement agreement has now expired. *See Mealey's Litigation Reports*: Asbestos, p. 43 (March 15, 1991).

[4] Report Of The Judicial Conference Ad Hoc Committee On Asbestos Litigation To The Chief Justice Of The United States And The Members Of The Judicial Conference Of The United States (March 1991).

490 U.S. 545, 556 (1989). Therefore, notwithstanding plaintiffs' understandable desire to avoid review, the Court should resolve the complete diversity of citizenship issue for Rule 23(b)(3) class actions.

II. REVIEW OF THE AMOUNT IN CONTROVERSY AND LOCAL ACTION JURISDICTIONAL ISSUES IS SIMILARLY IMPORTANT.

Plaintiffs offer no substantial reasons why the Court should not grant review of the other two subject matter jurisdiction issues raised by Kaiser Cement's Petition. As to the amount in controversy issue, plaintiffs contend (at 9) that the district court merely acted pursuant to the express authority provided by Fed. R. Civ. P. 12(d) in deferring the dismissal of class members with jurisdictionally insufficient claims "until the trial." As a fall back position, they also contend (at 10) that, in any event, the issue is now "moot" because the class definition has recently been amended to exclude most of the class members that are unlikely to have claims in excess of $10,000.[5]

Both of these contentions ignore that Kaiser Cement's Petition seeks review of a *final judgment* that dismissed with prejudice the claims of all members of the original, unamended class. Perhaps in anticipation of this rejoinder, plaintiffs further argue (at 14-15) that the "settling parties" were fully aware that some class members would be unable to assert claims in excess of $10,000 and that "[a]ll parties" accepted that such class members would not be bound by the LAQ settlement.

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[5] Although plaintiffs' Opposition intimates to the contrary (at 3 and nn. 9, 10; 4 & 10), the complaints below continue to allege on their face that some members of the amended class do *not* have claims in excess of $10,000 and the district court has *not* found that each member of the amended class can in good faith allege a claim in excess of $10,000. *See* Pretrial Order No. 273 and accompanying Memorandum reproduced in plaintiffs' Appendix at A-2.

Kaiser Cement admits that, in this instance, it does not understand the thrust of plaintiffs' argument, because it appears to suggest that the LAQ judgment was entered in error. However, rather than confessing error, it seems more likely that plaintiffs are advocating that a district court should be free to enter final judgment without regard to jurisdiction, leaving to subsequent courts faced with determining the judgment's *res judicata* effect the task of sorting out the jurisdictional issues.[6] In this respect, the uncertain impact of the LAQ final judgment simply highlights the fundamental problem underlying the lower courts' general conclusion that Rule 12(d) provides an excuse for deferring the correction of admitted jurisdictional defects "until the trial."

During the course of managing any complex nationwide class action, a district court will inevitably be required to make rulings prior to trial that substantially affect the rights of defendants and of absent class members. In the present case, the district court has already entered summary judgments dismissing with prejudice (i) the claims of all class members against defendant Combustion Engineering and (ii) the claims of many class members located in Georgia, Virginia and Hawaii against all defendants. However, the parties have no idea as to which (or how many) of those class members possess jurisdictionally sufficient claims and the district court only contemplates identifying them in the event that defendants lose on all liability

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[6] Plaintiffs assert (at 4) that Kaiser Cement's concern that class members might collaterally challenge the settlement "involves a speculative and hypothetical possibility." However, such challenges are not rare or without success. *See* Miller & Crump, *Jurisdiction And Choice Of Law In Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 36 n.247 (1986).

Indeed, recent news reports indicate that the settlement in the *Agent Orange* litigation has been subject to repeated collateral attacks by disgruntled class members. *E.g., The Wall Street Journal*, March 6, 1991, at B1, Col. 6; *see Ivy v. Diamond Shamrock Chemicals Co.*, 901 F.2d 7 (2d Cir. 1990).

issues and years from now the litigation eventually does proceed to a damage trial phase.[7]

In sum, under the jurisdictional approach adopted by the lower courts here, there is no basis for determining whether summary judgments or similar rulings have any binding effect. Avoidance of such judicial gridlock is one of the reasons that courts of limited jurisdiction traditionally have been forbidden to act on the merits until they have established their jurisdiction. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). To prevent the Third Circuit's decision from establishing a contrary jurisdictional philosophy based on what plaintiffs describe (at 2) as "fruitful and imaginative efforts" to maintain diversity-based class actions, the Court should grant review.

With respect to the Third Circuit's decision that tort claims for injury to real property are not subject to the local action doctrine, plaintiffs argue (at 15) that review is inappropriate because "there is no conflict among the courts of appeals."[8] Plaintiffs do not contend that any other court of appeals has ever endorsed the Third Circuit's view of the local action doctrine, and they do not deny that the Third Circuit's ruling conflicts with this Court's decisions in *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895) and *McKenna v. Fisk*, 42 U.S. (1 How.) 241 (1843) and with Chief Justice Marshall's opinion in *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811).

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[7] *See* Kaiser Cement App. 79a. Plaintiffs report (at 1) that the "district court is ready to begin trial this Summer or early Fall, 1991." The Court should be aware that the previously scheduled "first phase" trial would have dealt only with seven purported "common" factual issues. *See* Kaiser Cement App. 57a-58a. More recently, the district court determined that such a seven-issue trial would be unmanageable and announced that only one issue would be tried initially.

[8] The Third Circuit's decision does conflict with numerous decisions of state appellate courts. *E.g., McCormick v. Brown*, 297 S.W.2d 91, 92 (Tenn. 1956) (injury to Georgia residence as a result of blasting operations at nearby quarry was local action and therefore Tennessee courts lacked jurisdiction to entertain negligence action).

Although the existence of inconsistent interpretations among appellate courts is usually a strong indicator of the need for review, where, as here, the Court of Appeals' decision is inconsistent with long-established precedents of this Court, review is also appropriate, since what is at stake is the authority of the Court and ultimately of Congress to determine the limits of district court jurisdiction.

Finally, plaintiffs suggest (at 15) that Kaiser Cement lacks "standing to complain." Plaintiffs' standing objection disregards that the Third Circuit explicitly concluded that the district court had subject matter jurisdiction and that jurisdiction on appeal was proper. Kaiser Cement App. 6a. The Court of Appeals then proceeded to the merits and upheld the district court's ruling that Kaiser Cement lacked standing to challenge defects in the Rule 23(e) settlement approval process. *Id.* 10a.[9]

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[9] The second question presented in Kaiser Cement's Petition deals with this standing ruling. Rather than disputing Kaiser Cement's claim that its resolution will significantly affect the conduct of multi-defendant, diversity-based class actions in general, plaintiffs' Consolidated Opposition (at 14) and LAQ's Brief in Opposition (at 6-11) argue that the district court's standing ruling was correct.

Neither opposition, however, questions Judge Cowen's showing below that, as a matter of law in many jurisdictions, the district court's approval of the settlement extinguished Kaiser Cement's contribution rights against LAQ. Kaiser Cement App. 14a. In this respect, state law produces precisely the same effect as the "bar order" that afforded standing to non-settling defendants in *Kaypro*—a result that LAQ cites (at 9) with apparent approval. Likewise, neither opposition addresses the significance of the district court's ruling that, in exchange for defendants' loss of contribution rights, all class members "agree to adjust any subsequent recovery from non-settling defendants by any portion of the recovery attributable to LAQ." *Id.* 21a. Yet, it is uncertainty as to the enforceability of this ruling that Kaiser Cement sought to confront by raising defects in the settlement approval process.

It is no answer to assert, as does LAQ (at 11), that the district court's obligation to review the settlement notice and LAQ's interest in insuring its maximum preclusive effect, "adequately protect Kaiser's interests as a matter of law." Until the rulings below, it was unquestioned that a defendant, like Kaiser Cement, had standing to protect its own interests and to question whether the district court had in fact

It is beyond dispute that Kaiser Cement had standing to appeal from the district court's decision that it lacked standing to raise such defects. *In re Pittsburgh & Lake Erie R.R. Co. Securities & Antitrust Litigation*, 543 F.2d 1058, 1064 (3d Cir. 1976) ("party denied standing . . . to object, may obviously appeal such a determination"); *see Warth v. Seldin*, 422 U.S. 490 (1975). Prior to reaching this issue, the Court of Appeals also had a "special obligation" to determine whether the district court had subject matter jurisdiction to issue the complained-of order. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). Because Kaiser Cement was aggrieved by the Court of Appeals' rulings on both standing and jurisdiction, it has standing to present those issues to this Court.

III. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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met its obligation to review the settlement notice procedures. Given the significance of this standing decision, the Court should grant review so that its merits can be debated in full.